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NO. 81-89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,
Petitioner,

v.

ALPHA OTIS O'DANIEL STEPHENS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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TABLE OF CONTENTS

	Page
Relevant Docket Entries	ii
Trial Transcript pages 14-15, 298-307, 313-326	1
Trial Exhibits C, D, E, F, G, and H	24
Opinion of Supreme Court of Georgia on direct appeal	39
Opinion of Supreme Court of Georgia following denial of state habeas corpus petition	45
Federal habeas corpus petition	61
Judgment and Order of United States District Court	67
Opinion of Court of Appeals	74
Opinion of Court of Appeals on Petition for Rehearing and Rehearing En Banc	95

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 8, 1979:

Petition for a Writ of Habeas Corpus filed in the United States District Court for the Middle District of Georgia, Macon Division.

March 6, 1979:

Answer to petition filed.

May 11, 1979:

Order and Judgment for Petitioner Zant denying habeas corpus relief filed in the United States District Court.

June 5, 1979:

Appellee Stephens' Notice of Appeal to the Court of Appeals for the Fifth Circuit filed in the United States District Court.

June 8, 1979:

Order filed by United States District Court Judge Owens granting the Certificate of Probable Cause to Appeal.

November 26, 1980:

Judgment entered in the Court of Appeals for the Fifth Circuit reversing the United States District Court and remanding for further proceedings.

December 8, 1980:

Petition for Rehearing and for Rehearing En Banc filed in the Court of Appeals for the Fifth Circuit.

June 18, 1981:

Order filed in the Court of Appeals for the Fifth Circuit amending the previous opinion and denying the Petition for Rehearing and for Rehearing En Banc.

July 16, 1981:

Petition for a Writ of Certiorari filed by Petitioner Zant docketed in the United States Supreme Court.

October 5, 1981:

Order of the United States Supreme Court granting Petition for a Writ of Certiorari filed by Petitioner Zant.

[Trial Transcript at 14-15]

THE DISTRICT ATTORNEY: I am tendering to the counsel for the defendant certified copies—a certified copy of an indictment and a plea thereon to the offense of Motor Vehicle Theft in Twiggs Superior Court. This will be presented as an exhibit in the event of conviction.

THE COURT: I assume all these exhibits here are for that purpose?

THE DISTRICT ATTORNEY: That's right.

THE COURT: Just give the Defense the Numbers—

THE DISTRICT ATTORNEY: We are numbering them now.

THE COURT: All right.

THE DISTRICT ATTORNEY: Your Honor, I now have them identified as State's Exhibits A through H. They are pleas—indictments and pleas thereon.

THE COURT: I believe the purpose of this is for the record to show that you have given notice of your intention to use these exhibits in the event there is a conviction in this case.

THE DISTRICT ATTORNEY: That is correct, Your Honor.

THE COURT: And I would like to state that the State at a side bar conference indicated before the jury selection process began that you wished to make this tender, and by agreement the offer was reserved until after the jury was selected and back in the jury room so that they would not hear any discussion about it. I think that is all we need to do. You will have an opportunity to object to each one at the proper time in the event they are offered.

MR. HUGH LAWSON: This is not the proper time for objections?

THE COURT: You will have an opportunity later, but if you wish to make some objections now you may do so. This is simply a move on the State's part to give notice to the Defense that the State intends to use these in the event of conviction in this case—intends to use them in Aggravation.

MR. HUGH LAWSON: We acknowledge notice then and reserve our objections.

THE COURT: All right, fine. Are there any other matters to take up at this time?

THE DISTRICT ATTORNEY: No, sir, not by the State.

MR. HUGH LAWSON: No, sir.

THE COURT: All right. Ask the Jury to come in then, please.

* * *

[Trial Transcript at 298-307]

* * *

REPORTER'S NOTE: The jury retires.

THE COURT: I want the record to reflect that counsel have agreed and the Court has approved that the alternate juror, Mr. Mullis, will be isolated and will be utilized to replace one of the regular twelve jurors in the event of sickness or some other emergency requiring the Court to excuse one of the regular jurors, and he is now in isolation. We will be in recess now until the verdict is ready.

REPORTER'S NOTE: After a period of time the Court asks everyone to get in place in the court room and be quiet.

THE COURT: Before the introduction of evidence in this case the District Attorney gave notice on the record that he intended to utilize certain previous records—previous criminal records against the defendant possibly in aggravation, and it was indicated at that time that the defense had some objections to interpose. Of course, this may or may not be appropriate and may or may not serve a purpose in the trial, but it seems like we might very well get rulings in the record at this time, and if they become appropriate and are offered by the defense, at least we wont [*sic*] have to take out further time in the case. Is that procedure agreeable to you, Mr. Mullis?

THE DISTRICT ATTORNEY: Yes, Your Honor.

THE COURT: Mr. West?

MR. WEST: Yes, Your Honor.

THE COURT: All right. Why don't you go ahead and tender those. I believe you have tendered them to opposing counsel earlier haven't you?

THE DISTRICT ATTORNEY: Yes, I have, for inspection.

THE COURT: Are they marked by the Court Reporter?

THE DISTRICT ATTORNEY: Yes, sir, they are marked A through H—State's Exhibits A through H.

THE COURT: All right. Why don't you take them one by one and state what your objections are, Mr. West.

MR. WEST: All right, Your Honor. My objection to State's Exhibit A is that this is a record of a guilty plea

for the defendant in this case on the offense of Motor Vehicle Theft and Robbery, I believe, and Kidnapping of the decedent in this case. My objection is that it is all involved in the same transaction that we are trying to determine—it will be if he is convicted—that we are trying to determine a punishment in today. To allow separate convictions to be entered for conduct arising out of the same occurrence we believe is not what the legislator [*sic*] meant in this Code Section that we are working under. That is, presentence hearings in felony cases. We would argue that it is not admissible just based on the reading of the law.

THE COURT: What does that statute say, Mr. West? Do you have it before you?

MR. WEST: The pertinent part says, "Subject to the laws of evidence the jury or judge shall hear additional evidence in extinuation [*sic*] and mitigation and aggravation of punishment including the record of any prior criminal convictions and pleas of guilty, etc. ." Your Honor, the defense's argument is that the import of that is criminal conduct carried on prior to the situation in which the defendant is being tried—for which the defendant is being tried today. In other words, we are contending that the Kidnapping and the Motor Vehicle Theft and the Robbery or Burglary was all a part and parcel of the same transaction or at least it should be considered that way for sentencing purposes, and thereby exclude the record of those guilty pleas.

THE COURT: All right, let me hear from Mr. Mullis.

THE DISTRICT ATTORNEY: Your Honor, I disagree with Mr. West. I think that is what the law contemplated. These are matters that even though he had

not plead guilty could be taken in aggravation of the case now upon trial. Mr. West read just one portion there. This is more substantial than the Code requires because he had plead guilty to those things in aggravation, Armed Robbery, Kidnapping, Motor Vehicle Theft. Those are the things that were related prior—of course, they are alleged to have occurred on the same date as the matter that is now under trial—now on trial, but the pleas have been entered prior thereto. I will say that this goes even further than the law requires as far as the aggravation situation.

THE COURT: This is not too much unlike the case of State vs. Johnson that we had on appeal from this court, Mr. Mullis. Do you recall that case?

THE DISTRICT ATTORNEY: Yes, sir, I recall it.

THE COURT: I have considerable misgivings about that. I think since a ruling is not required right this moment I may take that section and read it carefully and perhaps try to pull out the Johnson case and take a look at it. Lets move on to B.

MR. WEST: B involves conduct also arising out of this same transaction, Your Honor. I believe this is the Burglary of the residence of Roy Asbell on the day in question, and I would object on the same grounds. C—the one objection applies to the same gambit, and I just save that to last. I don't think it would confuse anything to do that. C—well, I will go ahead and state my objection to the entire thing because it applies to C when none of my other objections do. The Defense contends that these are not properly authenticated as records of conviction based on the fact that—

THE COURT: Now, you are talking about C, D, E, F, G and H?

MR. WEST: A through H.

THE COURT: A through H. All right. That is an over all objection, and it based on the fact that the certificate is not signed by the Clerk. Rather, a stamped impression is made on each of these things. We contend that although that—we contend that a signature is required. We do not know if the Clerk stamped this or who stamped it. We just know that it is stamped or apparently stamped with his name on it.

THE COURT: I will have to see that, please.

MR. WEST: All right, sir.

THE COURT: Do you have any authority or statutes to cite to the Court on this proposition?

MR. WEST: No, Your Honor. This is just on general principles. I think that the Clerk or perhaps his designated agent is required to sign a certificate. I think that is the general principle. I don't have the statute in hand.

THE COURT: All right. Mr. Mullis, do you want to comment about this?

THE DISTRICT ATTORNEY: Yes, sir. I think, Your Honor, any—going back to the old common law where it was general—where you put your seal on something—each person had a ring, I believe, and they put wax down and placed their seal, and that was your affixed seal. I think that related all the way back to then and brought up to date it could be shown that the person in charge with the seal of the Clerk and with that seal affixed to an instrument that it certainly would certify that it is a court record. I think if you will go all the way back and bring

it up to date I believe that that is what it will show. It doesn't say it has to be written by pencil or pen or ink or a type writer or what-have-you, but a seal would be the certification just as the signature was back in the common law of England—just as the signature ring was back then.

THE COURT: Do you have any comments, Mr. West?

MR. WEST: Not on that basis, Your Honor.

THE COURT: All right. I'm going to overrule this particular one. In the first place I'm not able to say positively that that is a stamp. Some people might be able to write that evenly. I also feel that the seal—those are apparently valid court records. They do bear a seal which carries something like a presumption of regularity and officiality. I think the seal would cure whatever might appear to be an irregularity in the signature. Nothing else appearing I rule that those are proper certified copies.

MR. WEST: All right, Your Honor. Just for the record I would like to make the same—well, I have already made it for all of them.

THE COURT: Yes, you have made it for all of them.

MR. WEST: State's Exhibits E, F, G and H while being a record of a conviction also contain the sentence that was entered by the Court in those convictions. I strongly—the Defense strongly contends that this is not what the statute says. The statute plainly says Record of Conviction. It says nothing about prior sentences in those cases. We would say that it would unduly prejudice a jury in this case over and above the fact that offenses are committed. They would have an opportunity to compare sentences and what this man is already serving, and it would unduly influence their decision as to what he

should receive in this case. For that matter the sentence portion should certainly be kept from their consideration.

THE COURT: Well, that certainly is a novel approach, Mr. West. I had always thought that a record of conviction was the indictment, the verdict or plea, and the sentence of the Court thereon. In fact, without the sentence of the Court I don't see how you could tell what really happened. It might have been set aside. The verdict— It might have been reversed or some such matter. Mr. Mullis, do you want to make any observations about this?

THE DISTRICT ATTORNEY: Your Honor, I feel that it is appropriate. I feel that it is a part of the case.

THE COURT: I would say this. There have been several cases in the Appellate Courts to my knowledge where the sentence has come to the attention of the Defense Court without comment. I don't know if anyone ever raised the point up there. I take it you have no case specifically on this point, Mr. West.

MR. WEST: No, Your Honor, I do not.

THE COURT: Ali right. I do overrule the objection. My feeling is that the record of conviction consists of the indictment or accusation, the plea or the finding of a jury, and the sentence of the Court thereon.

MR. WEST: Well, Your Honor, based on your ruling on that Motion I would object to the first four, A through D, on the basis that they do not contain a complete record and that they do not have the sentence.

THE COURT: Well, you have the advantage of having them. I have not seen them. I don't know what you have got there. Do any of these have sentences, Mr. West?

MR. WEST: Do any of them have sentences?

THE COURT: Do any of these proceedings contain the sentence of the Court as adjudged, not—

THE DISTRICT ATTORNEY: No.

MR. WEST: The last four do, Your Honor.

THE DISTRICT ATTORNEY: No.

THE COURT: What is contained there is the sentence of the jury but not the judgement of the court.

MR. WEST: Well, Your Honor, that is what I was contending should not be put before the jury in the first instance. Perhaps technically I stand corrected. Undoubtedly I do, but that is the information that I was objecting to.

THE DISTRICT ATTORNEY: I have no objection to the sentence part—the sentence portion of it being obliterated or scratched through. It is just notations is what they are. I have no objections to those notations being obliterated in such a way that they cannot be seen.

THE COURT: All right. My ruling is that these matters may be considered. While I felt and still feel that if the sentence of the Court was here it would be properly included I also feel that the record as established barring some other showing by the accusation or indictment and the plea thereto or the finding of guilt thereon should not be—that these items should not be excluded just because some other part of the court record is not present. So that particular objection will be overruled. Are there other points?

MR. WEST: None by the Defense, Your Honor.

THE COURT: All right. I will take under advisement this special objection to A and B which involve offenses

arising out of the same identical course of conduct which occurred at substantially the same time. Frankly, I believe you can anticipate an adverse ruling to the State on that.

THE DISTRICT ATTORNEY: Your Honor, that could be distinguished from the Johnson case. If you are going to refer to that I think the two can be distinguished. I think—I believe what Your Honor ruled—I believe what the Court ruled in that case was that the occurrence —in other words, the crime was committed after the crime for which he was tried, but he was first tried on the other one. I believe the Court said it had to be a subsequent crime to the one that he was on trial for. I don't believe the Court ruled on the point that you are talking about there. It is subsequent offenses.

THE COURT: Well, let me put my thinking this way. These statutes should be strictly construed in favor of the accused.

THE DISTRICT ATTORNEY: Yes, sir.

THE COURT: There are aggravating circumstances which may be considered by the jury if they find them to be proven beyond a reasonable doubt, and some of those involved incidents closely related in time which can serve as an aggravating circumstance. Now to use as aggravation what some other Court finds and some other Jury finds would unnecessarily complicate this proceeding. That is part of my rationale about that.

THE DISTRICT ATTORNEY: But, Your Honor, you are not ruling out the argument to the Jury that such did take place?

THE COURT: No. I do not mean to do that at all.

THE DISTRICT ATTORNEY: All right.

THE COURT: As you gathered from the evidence presented in this trial here today and yesterday.

THE DISTRICT ATTORNEY: Yes, sir. I understand.

THE COURT: I think you can anticipate that I will give you a final word about this—we will not have to go back into it again, if we have to consider it at all.

THE DISTRICT ATTORNEY: All right, sir.

THE COURT: But you can anticipate I think at this time that A and B will be excluded and that C, D, E, F and G and H will be admitted. I will give you further opportunity to comment for any new things you want to bring up later. All right, we will be in further recess.

* * *

[Trial Transcript at 313-26]

* * *

THE COURT: Mr. Foreman, have the jury arrived at a verdict in this case?

JURY FOREMAN: We have, Your Honor.

THE COURT: You will please hand the indictment to one of the bailiffs. Which bailiff will receive it? Come over and receive it. We will ask the Clerk to receive the verdict from the bailiff and to read and publish that verdict.

CLERK OF COURT, MRS. GYNELLE VAN BUREN: Case Number 6713, State vs. Alpha Otis O'Daniel Stephens for Murder. We, the Jury, find the defendant guilty as charged this 21st day of January, 1975. Abbie G. Giddens, Foreman.

THE COURT: All right. Will the State have other evidence to present at this time?

THE DISTRICT ATTORNEY: Yes, Your Honor. The State will tender into evidence State's Exhibits H,G, C,D,E and F. I offer those into evidence.

THE COURT: All right. I believe I learned it C,D,E, F,G and H. Is that correct?

THE DISTRICT ATTORNEY: Well, I was just calling them out as I had them here. I can place them in order. All right, sir, I offer C,D,E,F,G and H into evidence.

THE COURT: C through H. All right. Now, certain objections are already entered by Defense Counsel, and they need not be renewed and insisted upon. I will consider them renewed and overruled. Are there any other objections to be made at this time?

MR. WEST: No, Your Honor.

THE COURT: All right, State's Exhibits C through H are admitted into evidence at this time.

THE DISTRICT ATTORNEY: There is no other evidence by the State to be presented, Your Honor.

THE COURT: All right. Do you simply wish to present those to the jury, or do you wish to read them or what?

THE DISTRICT ATTORNEY: Your Honor, I wish to just present them to the jury. The Court has admitted them, is that right?

THE COURT: Yes.

THE DISTRICT ATTORNEY: Well, I just wish to present them to the jury, and I wish to argue the case.

THE COURT: All right.

THE DISTRICT ATTORNEY: Argue the matter.

THE COURT: All right. Mr. West and Mr. Lawson,

will you have anything to present for the Defense?

MR. WEST: Yes, Your Honor, we do. We would like the Defendant to take the stand and testify.

THE COURT: That is his right, and he may do so. He may do so at this time.

MR. ALPHA OTIS O'DANIEL STEPHENS, HAVING FIRST BEEN DULY SWORN AS A WITNESS TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. WEST

Q. Now, Mr. Stephens, you have been convicted of the crime of the Murder of Mr. Roy Asbell. I want you to take this time to tell the jury what actually transpired on the night in question.

THE DISTRICT ATTORNEY: Your Honor, I would object to that as going into the trial of the issue, and the evidence as to what has happened is closed.

THE COURT: I agree with you that he is not permitted to impeach the verdict. However, I am not able to say that something that he will not say in recounting this would not be considered as mitigating or extinuating [*sic*] by the Jury. I don't know how I could possibly exclude that unless and until I hear what he says, and I would not presume also to say for the jury what they might find in extinuation [*sic*] and mitigation. So that objection is overruled. You may proceed.

Q. Proceed, Mr. Stephens.

A. Well, the fact is that I have never denied my guilt in the case. You see, I am guilty. What I wanted to get over to you people and the Judge is that I didn't pull the trigger. The way the whole thing happened was this man come up while we was coming out of the house. He came

up, and he said, "What are you niggers doing in my house". I said, "The car ran hot", you know. I said, "It ran hot and wouldn't crank". So I walked to the car where he was. He was getting out of the car. He saw the rifles we had in the car because the door was open. We had got them out of the house, you know. Then he went into his pocket, and he came out with a 38 Deringer. I kicked his arm. That was the only lick. The gun fell back on the seat, and I pulled him out away from it and got the gun and put it in my pocket. I went back to try to crank the Dodge, but it wouldn't crank. So I put him in his car and carried him down the road, not intending to kill him but to tie him up. I carried him almost there, which I was pretty high. Both of us was pretty high. When I got out of the car I stumbled in the ditch. That is how the mud got on my shoe—my right shoe—and the scratches. We got out of the car, and he crossed the fence, which he didn't run because he couldn't run. He walked with a limp. He went in the house. He was walking real fast, and he went in the house. Kellog asked me did I want to go after him. I said, "No, let him go". I said, "By the time he can get somewhere and call the police we can be about four or five miles down the road, at least to Dublin." He said, "No, we had better get him". So we walked on across the field and went into the house. I didn't have the gun. I gave him the gun before we left the house. So we walked up on the front porch, and when we opened the door he backed up, and then he went in. I was coming up the steps, and I heard two shots. I turned around on my heel and went back down the steps. He come on out there, and he said, "The man had a stick". It was a piece of iron, not no stick. So he come out, and he tied the door back up and walked on back to the car. He had got the man's bill fold, and he looked in it, and that is when he pulled the money out of it. He pulled

the money out, and the papers flew out when he threw it up in the bushes. That explains where the man found it, you know. That little notebook fell down too, and then we got into the car, and I drove. The blood that was in the car was from my right hand, which I cut there at the man's house. So after that I got stoned. I went to Savannah. I got pretty high. I met this girl. About three o'clock I drank some more—I dropped some more pills. I had about two of them left. They was in my pocket when they carried me to jail. I took one that next morning, and then later on the other one, and I was about out of it all that day. They were small pills, about as big as a match head. All that statement that that detective was talking about me making, I don't know nothing about that. That's the truth. As far as that man getting killed, I'm sorry about that. I aint [*sic*] going to tell you no lie. If I could bring him back, I probably would, but that I can't do. There aint [*sic*] nothing I can do about it. If I had shot him, I would say I shot him. I would tell you or anybody else I shot him if I did. So whatever you all come up with is all right with me. I know I deserve being punished.

Q. O.K., Mr. Stephens.

MR. WEST: That's all that we have from this witness.

THE COURT: All right. I think under the law he would be subject to cross examination. I take it that you do not argue with that.

MR. WEST: I don't argue with that principle, Your Honor.

THE COURT: You may cross examine, Mr. Mullis.

THE DISTRICT ATTORNEY: All right, sir.

CROSS EXAMINATION OF MR. ALPHA OTIS O'DANIEL STEPHENS BY THE DISTRICT ATTORNEY

Q. Now, you have made contrary statements to the effect that you—you come in here late in the day and say that you weren't the one who pulled the trigger. Did you not tell the sheriff that you shot him and that you weren't losing any sleep over it?

A. No, I didn't tell him that.

Q. Do you recall when he was taking you back from the Commitment Hearing?

A. No.

Q. You told him and Mr. Randy Johnson that you shot him and that you weren't losing any sleep over it?

A. Well, let me tell it to you like this. What have I got to lose? I'm serving five life sentences plus fifty years. If I had shot that man, I would tell you I shot him. I would tell you, him or anybody else if I had shot him.

Q. In other words, —he had something to lose though. He lost his life.

A. I didn't take it. That's what I'm trying to get across to these men. I would have copped out from the beginning for a life sentence if I did it. The reason I had this trial here before these people here is I didn't pull the trigger on the man.

Q. This is the first time you have ever uttered that statement isn't it?

A. No, it aint [*sic*] the first time.

Q. Who have you told besides your lawyers that you were going to make such a statement?

A. I aint [*sic*] told nobody.

Q. Nobody. That's right.

A. I aint [*sic*] told nobody but myself.

THE DISTRICT ATTORNEY: No further questions.

THE COURT: Any other questions?

MR. WEST: No, Your Honor. Come down, Mr. Stephens. The Defense has no further evidence in extinuation [*sic*] or mitigation.

THE COURT: Will the State have anything further?

THE DISTRICT ATTORNEY: No, sir.

THE COURT: I believe the jury left all of the evidence in the jury room. I don't know if you will need to refer to any of it in your arguments, but if you do I will send a bailiff to the jury room to get it. The State, as I understand the law, has the right to open here, and the Defense has the right to conclude.

THE DISTRICT ATTORNEY: Your Honor, if it is agreeable I will reserve my concluding remarks and just make one argument.

THE COURT: As I understand it, Mr. Mullis, the State has only the opening argument. The Defense has the concluding argument.

THE DISTRICT ATTORNEY: All right, sir, I will go forward with it then.

THE COURT: We might be able to threash [*sic*] this out, but I understand that you do not have any closing at all. The State has the opening, and the Defense has the closing. I have that statute here.

THE DISTRICT ATTORNEY: That's all right then. I will go forward at this time. I'm ready. The State is ready.

THE COURT: All right.

REPORTER'S NOTE: Arguments are made to the jury by the District Attorney, Mr. Hugh Lawson and Mr. Phillip R. West respectively.

FURTHER CHARGE OF THE COURT:

Gentlemen of the Jury, the defendant in this case has been found guilty at your hands of the offense of Murder, and it is your duty to make certain determinations with respect to the penalty to be imposed as punishment for that offense. Now in arriving at your determinations in this regard you are authorized to consider all of the evidence received in court throughout the trial before you. You are further authorized to consider all facts and circumstances presented in extinuation [*sic*], mitigation and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense. Under the law of this State every person guilty of Murder shall be punished by death or by imprisonment for life, the sentence to be fixed by the jury trying the case. In all cases of Murder for which the death penalty may be authorized the jury shall consider any mitigating circumstances or aggravating circumstances authorized by law. You may consider any of the following statutory aggravating circumstances which you find are supported by the evidence. One, the offense of Murder was committed by a person with a prior record of conviction for a Capital felony, or the offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Two, the offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Three, the offense of Murder was committed by a person who has escaped from the lawful

custody of a peace officer or place of lawful confinement. These possible statutory circumstances are stated in writing and will be out with you during your deliberations on the sentencing phase of this case. They are in writing here, and I shall send this out with you. If the jury verdict on sentencing fixes punishment at death by electrocution you shall designate in writing, signed by the foreman, the aggravating circumstances or circumstance which you found to have been proven beyond a reasonable doubt. Unless one or more of these statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death. If you fix punishment at death by electrocution you would recite in the exact words which I have given you the one or more circumstances you found to be proven beyond a reasonable doubt. You would so state in your verdict, and after reciting this you would state, We fix punishment at death. On the other hand, if you recommend mercy for the defendant this will result in imprisonment for life of the defendant. In such case it would not be necessary for you to recite any mitigating or aggravating circumstances as you may find, and you would simply state in your verdict, We fix punishment at life in prison. Now, whatever your verdict may be with respect to the responsibility you have regarding sentencing please write these out, Mr. Foreman, immediately below the previous verdict you have rendered. Be sure that it is dated and that it bears your signature as foreman. Once again when you have arrived at your verdict on the sentencing phase of the case let us know. We will then receive the verdict from you and have it published here in open court. Please retire now and consider the sentence in this case.

REPORTER'S NOTE: The jury retires from the court room.

THE COURT: Would the Defense like to make any observations or objections to the Charge—I mean the State?

THE DISTRICT ATTORNEY: Your Honor, the State is satisfied that the Court has instructed the Jury fully and fairly.

THE COURT: Mr. West, would you like to make any observations? Once again, you are not required to make any observations whatever—Mr. West or Mr. Lawson.

MR. HUGH LAWSON: May it please the Court, the Defense objects to the inclusion of the second statutory ground charged by the Court in this portion of the charge. The Defense objects to the oral charge to the jury of that and then to sending it out in writing with the jury. We object to that on the grounds that that portion—that the facts of the case do not support the inclusion of the entire ground.

THE COURT: All right. I have studied these matters very carefully. We have very little from the Appellate Courts to guide us on exactly what grounds to be included. My ruling is that—of course, I have no idea what this jury will find, but my ruling is that there is a possible range of facts that would authorize the finding by the jury supporting this particular ground. Therefore, your objection is overruled.

MR. HUGH LAWSON: Just for the record, is my objection clear? I'm referring to the second statutory ground. I can't quote it verbatim.

THE COURT: I think so. You probably are specifically objecting to the language, the murder was outrageously or wantonly vile, horrible or inhuman in that it involved

torture, depravity of mind or an aggragated battery on the victim.

MR. HUGH LAWSON: Yes, sir.

THE COURT: That is the part of it I would assume you are referring to.

MR. HUGH LAWSON: Yes, sir, that's the one I was referring to.

THE COURT: There is evidence here of the injury inflicted upon the deceased, his being taken by force. Whether all these acts—what happened out there at the scene or [*sic*] vile, horrible or inhuman and involved torture and depravity of mind, I'm going to leave that to the jury. Are there any other observations?

MR. HUGH LAWSON: No, sir.

THE COURT: All right, thank you. We will be in recess until the jury reaches a verdict.

REPORTER'S NOTE: After a period of time the Court asks that the attorneys get back in place.

THE COURT: I'm going to discharge the alternate juror at this time. Ask the alternate juror to please come on into the court room, please.

REPORTER'S NOTE: The laternate [*sic*] juror stands before the Court.

THE COURT: You might go over and sit down at the end of the jury box and let me have a final word with you, please. First, Mr. Mullis, let me inform you that the jury have made findings of guilty in this case, and they are now in the process of discharging their duty by fixing the penalty to be imposed in the case. I think we are far enough along now that the Court can go ahead and excuse you from your involvement in this case. I never have

figured out exactly what to say to an alternate juror. You have a very heavy responsibility, and yet you don't really accomplish anything. You don't have the sense of accomplishment of doing something that perhaps other jurors do. I guess this is just a penalty for being a citizen. We do thank you for your service. We will look for you back in the court room at nine o'clock in the morning. You are excused at this time.

REPORTER'S NOTE: After a period of time we again come before the Court.

THE COURT: Gentlemen, it has been some little time since the jury went out. I propose at this time to bring the jury in and find out if they wish to continue their deliberations tonight, and if they do to send for some light food and refreshments for them. What they tell me may lead to some other course of conduct on my part. I will be glad to discuss that with counsel depending upon what is said. I assume there is no objection to my doing this?

THE DISTRICT ATTORNEY: No, sir.

MR. WEST: No, Your Honor.

THE COURT: All right. Ask the jury to come in, please.

REPORTER'S NOTE: The bailiff goes to the jury room door, and then returns to the court room.

BAILIFF ALLEN: Your Honor, they asked for a five minute delay before coming in.

THE COURT: All right, fine. We will just remain in place.

REPORTER'S NOTE: After a few minutes there is a knock on the jury door.

THE COURT: See if they are ready to come in.

REPORTER'S NOTE: The jury is in the jury box.

THE COURT: Mr. Foreman, have the jury arrived at a verdict as to sentence?

JURY FOREMAN: We have, Your Honor.

THE COURT: All right, fine. If you will hand the indictment there to the bailiff I will ask him to bring it around to the Clerk, and we will ask our Clerk to read and publish the verdict. The sheriff can take those papers.

MRS. GYNELLE VAN BUREN, CLERK OF COURT: We, the Jury, recommend the death penalty. (1) The offense of Murder was committed by a person with a prior record of conviction for a capital felony. The offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions. (2) The offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer and place of lawful confinement. Abbie G. Giddens, Foreman. 21 January, 1975.

THE COURT: The verdict seems to be in proper form. I will be glad to submit the verdict to counsel to read if you wish.

THE DISTRICT ATTORNEY: No, sir, I do not wish to see it, Your Honor.

MR. WEST: No, Your Honor, we do not wish to examine the verdict.

SPECIAL PRESENTMENT

GEORGIA, TWIGGS COUNTY:

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen and sworn for the County of Twiggs, to wit:

1. WALKER ROLAND Foreman

2. E. F. HARDY
3. JIMMY ELI LUCAS
4. MARVIN BROWN, JR.
5. BARBARA LOUISE DENNARD
6. L. J. BROWN
7. ROBERT HARRISON FLOYD
8. [illegible]
9. [illegible]
10. [illegible]
11. DAVID McNEELY
12. ELLISTINE MALONY JOHNSON
13. HARDIE LEE KITCHENS
14. JEROME NOBY, JR.
15. MRS. GEORGE W. FAULK
16. JAMIE B. FRILIAN
17. BERNARD J. HOWELL
18. B. P. HUMPHRIES
19. JULIAN J. LINLEY
20. WILBUR CECIL McCARTY
21. BEN HILL HORTON
22. JOHN C. BURNS, JR.
23. BENJAMIN SINCLAIR

In the name and behalf of the citizens of Georgia, charge and accuse ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS, and CLAUDE SAMPSON, alias KELLOGG SAMPSON

with the offense of ARMED ROBBERY

for that the said ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS, and CLAUDE SAMPSON, alias KELLOGG SAMPSON

(See A PORTION OF STATE'S EXHIBIT C

SPECIAL PRESENTMENT:
PAGE TWO

CR-300

in the County and State aforesaid, on the 20th day of August, in the year of our Lord Nineteen Hundred and Seventy-Four, did unlawfully with intent to commit theft, took from the person or immediate presence of Mr. Paul Riley the following described property, to wit: $250.00 in lawful United States Currency, the property of Mr. Paul Riley, trading and doing business as Riley's Grocery, said business located on Georgia Highway 57 in Twiggs County, Georgia, and said property being of the value of $250.00, by use of a pistol, the same being an offensive weapon, contrary to the laws of said State, the good order, peace and dignity thereof.

SPECIAL PRESENTMENT:

Beverly B. Hayes

BEVERLY B. HAYES
DISTRICT ATTORNEY

TWIGGS SUPERIOR COURT
OCTOBER TERM, 1974

-349- A PORTION OF STATE'S EXHIBIT C

PLEA OF DEFENDANT WITH COUNSEL

The defendant(s) [illegible] alias [illegible] alias [illegible] alias

SPECIAL PRESENTMENT

GEORGIA, TWIGGS COUNTY:

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen and sworn for the County of Twiggs, to wit:

1. WALKER ROLAND Foreman

2. E. F. HARDY
3. JIMMY ALI LUCAS
4. MARVIN HOUSE, JR.
5. BARBARA LOUISE DENNARD
6. L. J. BRAN
7. ROBERT HARRISON FLOYD
8. WILLIAM WALL
9. WOODROW LITTLE, JR.
10. WILLIAM E. BARRENTINE
11. DAVID KIMBERLY
12. ELLISTINE MALLORY JORDAN
13. HARDIN LEE KITCHENS
14. JEROME NEWBY, JR.
15. MRS. GEORGE W. PAULK
16. JANIE D. FREEMAN
17. BERNARD J. HOWELL
18. B. F. HUMPHRIES
19. BILLY J. LINLEY
20. WILLIAM CECIL FOGARTY
21. [illegible] HILL DUNCAN
22. JOHN C. BURNS, JR.
23. BENJAMIN SINCLAIR

In the name and behalf of the citizens of Georgia, charge and accuse ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS, and CLAUDE SAMPSON, alias KELLOGG SAMPSON

with the offense of BURGLARY

for that the said ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS, and CLAUDE SAMPSON, alias KELLOGG SAMPSON

-372- A PORTION OF STATE'S EXHIBIT NUMBER D

SPECIAL PRESENTMENT:
PAGE TWO

0025J

in the County and State aforesaid, on the 21ST day of August,
in the year of our Lord Nineteen Hundred and Seventy- Four, did
unlawfully and without authority and with intent to commit a theft therein,
entered the dwelling house being the residence of David Hightower, contrary
to the laws of said State, the good order, peace and dignity thereof.

SPECIAL PRESENTMENT

Beverly B. Hayes

BEVERLY B. HAYES
DISTRICT ATTORNEY

TWIGGS SUPERIOR COURT
OCTOBER TERM, 1974

-373- A PORTION OF STATE'S EXHIBIT D

PLEA OF DEFENDANT WITH COUNSEL

The defendant(s) ALPHA OTIS O'DANIEL, JR. [illegible], alias ALPHA OTIS DANIEL STEPHENS, alias [illegible] alias JOHN DANIEL, alias WILLIE [illegible]

being represented by the undersigned attorney(s), waives/demands copy of special presentment and list of witnesses; waives/demands being formally arraigned, and pleads [illegible] Copy of Special Presentment and List of Witnesses received.

This 17th day of OCTOBER, 1974

Beverly B. Hayes
Beverly B. Hayes, District Attorney

Alpha Stephens
Defendant

[illegible]
Defendant's Attorney

for all the reasons stated in the attached

The defendant(s), _____

being represented by the undersigned attorney(s), waives/demands copy of special presentment and list of witnesses; waives/demands being formally arraigned, and pleads _____ Copy of Special Presentment and List of Witnesses received.

This _____ day of _____, 19____

Beverly B. Hayes, District Attorney

Defendant

Defendant's Attorney

1S206

P 1-20

No. 1

THE STATE

vs.

ALPHA OTIS O'DANIEL, JR. [illegible], alias ALPHA OTIS DANIEL STEPHENS, alias [illegible] alias JOHN DANIEL, alias WILLIE [illegible] alias [illegible] and [illegible] alias [illegible]

[illegible] Superior Court

OCTOBER Term, 19 74

Sept 16 3

Filed [illegible] day of [illegible], 19[illegible]

[illegible]
Deputy Clerk

Sent. rec.

This 16th day of Oct., 19 74

Sheriff

Deputy

Beverly B. Hayes
BEVERLY B. HAYES
District Attorney

VERDICT

We, the Jury, find the defendant, _____

This ____ day of _____, 19____

Foreman

Sheriff A. G. Hardwick
Dep. Sheriff Charles Thaxton
Deputy David Hightower
Deputy [illegible]

Office of Beverly B. Hayes
Dist. Atty. Rockdale Judicial Circuit

Ret. Order & Bench Warrant
Ret. Writ not to be executed
Before the Grand Jury

Before the Grand Jury

Rep during Christmas Recess

A PORTION OF STATE'S EXHIBIT D

374

GEORGIA, TWIGGS COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen and sworn for the County of TWIGGS, to-wit:

HUGH GLENN DYKES, Foreman

2. F. G. BLOUNT	13. STEPHEN H. HAMRICK
3. WASHINGTON SINCLAIR	14. DOYLE L. STONE, SR.
4. BUNYON FAULK	15. TOMMY E. SMITH
5. SPURGEON W. SIMMONS	16. BERTHA MAE EASON
6. MARK W. FITZPATRICK	17. MYRON J. WARREN
7. FRED LARSEN	18. JEROME L. NEWBY, III
8. MYRTLE H. RAWLINS	19. CHARLOTTE CABINESS
9. S. M. CALLEMORE	20. DAN S. FAULK
10. WILFRED SOLOMON EMORY	21. BENNIE F. JOHNSON, JR.
11. GERALDINE C. GRUBBS	22. MILDRED CLARKE BURNS
12. DAN JEROME HASTY	23. LILLIE GRACE EASON

COUNT I

In the name and behalf of the citizens of Georgia, charge and accuse Gus Beeles, Robert Lee Russell, alias Pete Russell, and Alpha Otis Odaniel Stephens, alias Sonny Boy Stephens and alias Alfred Stephens, of the County and State aforesaid, with the offense of BURGLARY

for that the said Gus Beeles, Robert Lee Russell, alias Pete Russell, and Alpha Otis Odaniel Stephens, alias Sonny Boy Stephens and alias Alfred Stephens in the County aforesaid, on the 20th day of April, in the year of our Lord Nineteen Hundred and Seventy-Three, with force and arms, did unlawfully and without authority and with intent to commit a theft therein, enter the dwelling house of Mrs. Selma Hamrick Mercer, and did commit a theft therein, the value of the property taken exceeding a value of $100.00, all contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT II

And the aforesaid named Grand Jurors, selected chosen and sworn for the County of Twiggs, State of Georgia, in the name and behalf of the citizens of Georgia, charge and accuse Gus Beeles, Robert Lee Russell, alias Pete Russell, and Alpha Otis Odaniel Stephens, alias Sonny Boy Stephens and alias Alfred Stephens, of the County and State aforesaid, with the offense of Burglary, for that the said Gus Beeles, Robert Lee Russell, alias Pete Russell, and Alpha Otis Odaniel Stephens, alias Sonny Boy Stephens and alias Alfred Stephens, in the county aforesaid on the 20th day of April, in the year of our Lord Nineteen Hundred and Seventy-Three, with force and arms, did unlawfully and without authority and with intent to commit a theft therein, enter the dwelling house of Earl Fountain, and did commit a theft therein, the value of the property taken exceeding a value of $100.00, all contrary to the laws of said State, the good order, peace and dignity thereof.

Count 1 Stephens 3 yrs Conc. w/ 1445
" " 3 yrs Conc
Count 1-16

SPECIAL PRESENTMENT:

Beverly B. Hayes
BEVERLY B. HAYES, DISTRICT ATTORNEY

TWIGGS SUPERIOR COURT
APRIL TERM, 1973

Received in Open Court April Term 1973

-376- A PORTION OF STATE'S EXHIBIT E

PLEA OF DEFENDANT WITH COUNSEL

The defendant, ALIAS OTIS ODANIEL STEPHENS, alias SONNY BOY STEPHENS, being represented by the undersigned attorney, ~~waives/demands~~ copy of special presentment and list of witnesses, ~~waives/demands~~ being formally arraigned, and pleads GUILTY. Copy of Special Presentment and List of Witnesses received.

This 16th day of November, 19 73.

Beverly B. Hayes, District Attorney

Defendant

Defendant's Attorney

PLEA OF DEFENDANT WITHOUT COUNSEL

The defendant, _____, appearing by his own choice without counsel acknowledges that the Judge of the Court has fully advised him of his right to counsel at all stages of the case against him, acknowledges that the Judge has offered and does now offer to appoint an able attorney to act as counsel for defendant, and the defendant has refused to accept the services of such counsel and now so refuses and the defendant, so refusing to have counsel represent him and so refusing to have counsel advise him, does hereby waive copy of Special Presentment and List of Witnesses, does hereby waive formal arraignment, and pleads

_____

This _____ day of _____, 19____

Beverly B. Hayes, District Attorney

Defendant

THE STATE

vs.

GUS REEVES, ROBERT LEE RUSSELL, alias FELIX RUSSELL, and ALPHA OTIS ODANIEL STEPHENS, alias SONNY BOY STEPHENS, and ALPHA ALFRED STEPHENS.

BURGLARY (2 Counts)

Filed this 16th day of November, 1973

Beverly B. Hayes, District Attorney

Stephens: Sentenced to 3 yrs. to run concurrent with Case #'s 14 and 15

WITNESSES FOR THE STATE

Sheriff Earl Hamrick
Deputy Charles Thorpe
Chief of Police O. E. Poole
Mrs. Selma Hamrick Tarver
Earl Fountain

WITNESSES APPEARING BEFORE THE GRAND JURY

VERDICT

We, the jury, find the defendant _____ guilty as charged in the indictment.

This _____ day of _____, 19____

_____

Foreman

No. 3-377

ADMITTED OF STATE'S EXHIBIT 2

SPECIAL PRESENTMENT

GEORGIA, ... TWIGGS ..... COUNTY.

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen and sworn for the County of ..... TWIGGS ..... term

1. HUGH GLENN DYKES, Foreman

2. F. G. BLOUNT
3. WASHINGTON SINCLAIR
4. BUNYON FAULK
5. SPURGEON W. SIMMONS
6. MARK W. FITZPATRICK
7. FRED LARSEN
8. MYRTLE H. RAWLINS
9. S. H. GALLEMORE
10. WILFRED SOLOMON EMORY
11. GERALDINE C. GRUBBS
12. DAN JEROME HASTY
13. STEPHEN H. HAMRICK
14. DOYLE L. STONE, SR.
15. TOMMY E. SMITH
16. BERTHA MAE EASON
17. MYRON J. WARREN
18. JEROME L. NEWBY, III
19. CHARLOTTE CABINESS
20. DAN S. FAULK
21. BENNIE F. JOHNSON, JR.
22. MILDRED CLARKE BURNS
23. LILLIE GRACE EASON

In the name and behalf of the citizens of Georgia, charge and accuse ALPHA OTIS ODANIEL STEPHENS, alias SONNY BOY STEPHENS and alias ALFRED STEPHENS,

of the County and State aforesaid, with the offense of BURGLARY

for that the said ALPHA OTIS ODANIEL STEPHENS, alias SONNY BOY STEPHENS and alias ALFRED STEPHENS in the County aforesaid, on the 17th day of April, in the year of our Lord Nineteen Hundred and Seventy-Three, with force and arms, did unlawfully and without authority and with intent to commit a theft therein, enter the dwelling house of Royce Baxley and did commit a theft therein, all contrary to the laws of said State, the good order, peace and dignity thereof.

SPECIAL PRESENTMENT:

Beverly B. Hayes

BEVERLY B. HAYES, DISTRICT ATTORNEY

TWIGGS SUPERIOR COURT
APRIL TERM, 1973

3-7-74

-379- A PORTION OF STATE'S EXHIBIT P

PLEA OF DEFENDANT WITH COUNSEL

The defendant, Alpha Otis Stephens alias Sonny Boy Stephens

being represented by the undersigned attorney, waives copy of indictment and list of witnesses, waives being formally arraigned, and pleads Guilty Copy of Indictment/Presentment and List of Witnesses received.

This 16th day of December 19 73

[signature] District Attorney

[signature] Defendant's Attorney

PLEA OF DEFENDANT WITHOUT COUNSEL

The defendant, _____

appearing by his own choice without counsel acknowledges that the Judge of the Court has fully advised him of his right to counsel at all stages of the case against him, acknowledges that the Judge has offered and does now offer to appoint an able attorney to act as counsel for defendant, and the defendant has refused to accept the services of such counsel and now so refuses and the defendant, so refusing to have counsel represent him and so refusing to have counsel advise him, does hereby waive copy of Special Presentment and List of Witnesses, does hereby waive formal arraignment, and pleads

_____

This _____ day of _____ 19____

_____ Beverly B. Hayes, District Attorney

_____ Defendant

No. 146

TWIGGS Superior Court

APRIL Term, 1973

THE STATE

vs.

ALPHA OTIS COMMIEL STEPHENS, alias SONNY BOY STEPHENS, and alias ALFRED STEPHENS.

BURGLARY

Filed in Office

Clerk

By Deputy Clerk

BEVERLY B. HAYES
District Attorney

WITNESSES FOR THE STATE:

Sheriff Earl Ramrick
Boyce Ramrick, Route #4,
Macon, Georgia

WITNESSES APPEARING BEFORE THE GRAND JURY:

VERDICT

We the jury, find the defendant

This _____ day of _____ 19____

Foreman

A PORTION OF STATE'S EXHIBIT F

SPECIAL PRESENTMENT

GEORGIA, TWIGGS COUNTY:

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen and sworn for the County of Twiggs, to wit;

00292

1. WALKER ROLAND Foreman

2. E. F. HARDY
3. JIMMY ELI LUCAS
4. MARVIN BROWN, JR.
5. BARBARA LOUISE DENNARD
6. L. J. BROWN
7. ROBERT HARRISON FLOYD
8. WILLIAM WALL
9. WOODROW [illegible], JR.
10. WILLIAM E. BARRENTINE
11. DAVID WINBERLY
12. ELLISTINE MALLORY JORDAN
13. HARDIE LEE KITCHENS
14. JEROME MIMS, JR.
15. MRS. GEORGE M. FAULK
16. JAMIE D. FREEMAN
17. BERNARD J. HOWELL
18. B. T. HEPHERIES
19. JULIAN J. LUMLEY
20. WILBUR CECIL FOUGERTY
21. BEN HILL HORTON
22. JOEL C. BURNS, JR.
23. BENJAMIN SINCLAIR

COUNT I

In the name and behalf of the citizens of Georgia, charge and accuse FRANCES NORWOOD ROSS, EDNA MATHIS, JO ANN NORWOOD, DELORIS McPHERSON, and ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS

-382- A PORTION OF STATE'S EXHIBIT G

with the offense of ARMED ROBBERY

for that the said FRANCES NORWOOD ROSS, EDNA MATHIS, JO ANN NORWOOD, DELORIS McPHERSON, and ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIE alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS

-383- A PORTION OF STATE'S EXHIBIT G

SPECIAL PRESENTMENT:
PAGE TWO

in the County and State aforesaid, on the 18th day of May, in the year of our Lord Nineteen Hundred and Seventy- Three, did unlawfully with the intent to commit theft, took from the person or immediate presence of Miss Louise Mercer the following described property, to wit: $360.00 in lawful United States Currency of the property of Ralph Mercer, trading and doing business and known as Mercer's Grocery which is located off United State Highway 80 in Twiggs County, Georgia, said property being of the value of $360.00, by use of a pistol, the same being an offensive weapon, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT II

And the aforesaid Grand Jurors, selected, chosen and sworn for the County of Twiggs and State of Georgia, in the name and behalf of the citizens of Georgia, charge and accuse FRANCES NORWOOD ROSS, EDNA MATHIS, JO ANN NORWOOD, DELORIS McPHERSON, and ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS, with the offense of MURDER for that the said FRANCES NORWOOD ROSS, EDNA MATHIS, JO ANN NORWOOD, DELORIS McPHERSON, and ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS in the County and State aforesaid, on the 18th day of May in the year of our Lord Nineteen Hundred and Seventy-Three did unlawfully and with malice aforethought kill one MISS LOUISE MERCER, a human being, by shooting the said MISS LOUISE MERCER with a certain pistol, contrary to the laws of said State, the good order, peace and dignity thereof.

SPECIAL PRESENTMENT:

Beverly B. Hayes

BEVERLY B. HAYES
DISTRICT ATTORNEY

TWIGGS SUPERIOR COURT
OCTOBER TERM, 1974

-381- A PORTION OF STATE'S EXHIBIT C

PLEA OF DEFENDANT WITH COUNSEL

The defendant(s), [illegible] being represented by the undersigned attorney(s), waives/demands copy of special presentment and list of witnesses, waives dismiss being formally arraigned, and pleads [illegible] Copy of Special Presentment and List of Witnesses received.

This 17th day of OCTOBER, 19[illegible]

Beverly B. Hayes, District Attorney

Defendant

Defendants Attorney

The defendant(s), _____

being represented by the undersigned attorney(s), waives/demands copy of special presentment and list of witnesses, waives/demands being formally arraigned, and pleads _____ Copy of Special Presentment and List of Witnesses received.

This _____ day of _____ 19____

Beverly B. Hayes, District Attorney

Defendant

Defendants Attorney

No. 5

THUGGS Superior Court

OCTOBER Term, 19 74

THE STATE

vs.

FRANCES NORWOOD ROSS, ERMA MATHIS, JO ANN NORWOOD, DELORIS McPHERSON, and ALIFA OTIS ODANIEL STEPHENS, alias [illegible] DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY LEE STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES [illegible], alias WILL TYLER, alias ALPHA STEPHENS,

COUNT I -- ARMED ROBBERY

COUNT II -- MURDER

Bill

This 25 day of October 1974

Foreman

Prosecutor

BEVERLY B. HAYES
District Attorney

WITNESSES FOR THE STATE:

SEE ATTACHED LIST OF WITNESSES

WITNESSES APPEARING BEFORE THE GRAND JURY:

VERDICT

We, the jury, find the defendant, _____

This 25th day of October 1974

Foreman

384 A PORTION OF STATE'S EXHIBIT C

SPECIAL PRESENTMENT

GEORGIA, TWIGGS COUNTY:

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen and sworn for the County of TWIGGS term,

1. HUGH GLENN DYKES, Foreman
2. F. G. BLOUNT
3. WASHINGTON SINCLAIR
4. BUNYON FAULK
5. SPURGEON W. SIMMONS
6. MARK W. FITZPATRICK
7. FRED LARSEN
8. MYRTLE H. RAWLINS
9. S. M. GALLEMORE
10. WILFRED SOLOMON EMORY
11. GERALDINE C. CRUBBS
12. IAN JEROME HASTY
13. STEPHEN H. HANNICK
14. DOYLE L. STONE, Sr.
15. TOMMY E. SMITH
16. BERTHA MAE EASON
17. MYRON J. WARREN
18. JEROME L. NEWBY, III
19. CHARLOTTE CARINESS
20. DAN S. FAULK
21. BENNIE F. JOHNSON, JR.
22. MILDRED CLARKE BURNS
23. LILLIE GRACE EASON,

In the name and behalf of the citizens of Georgia, charge and accuse PAUL NEELEY and ALPHA OTIS ODANIEL STEPHENS, alias SONNY BOY STEPHENS, and alias ALFRED STEPHENS of the County and State aforesaid, with the offense of BURGLARY

for that the said PAUL NEELEY and ALPHA OTIS ODANIEL STEPHENS, alias SONNY BOY STEPHENS, and alias ALFRED STEPHENS in the County aforesaid, on the 13th day of April, in the year of our Lord Nineteen Hundred and Seventy-Three, with force and arms, did unlawfully and without authority and with intent to commit a theft therein, enter the dwelling house of Josh Wimberly, and did commit a theft therein, the value of said property exceeding a value of $100.00, all contrary to the laws of said State, the good order, peace and dignity thereof.

SPECIAL PRESENTMENT

Beverly B. Hayes

BEVERLY B. HAYES, DISTRICT ATTORNEY

TWIGGS SUPERIOR COURT
APRIL TERM, 1973

Stephens 3 yrs - Concurrent to 14

Neeley 3 yrs.

-386- A PORTION OF STATE'S EXHIBIT H

No. 15

PLEA OF DEFENDANT WITH COUNSEL

The defendant, ALTHA OTIS DANIEL STEPHENS, alias SONNY BOY STEPHENS being represented by the undersigned attorney, waives/demands copy of special presentment and the list of witnesses, waives/demands being formally arraigned and pleads GUILTY. Copy of Special Presentment and List of Witnesses received.

This 16th day of November, 19 23

Beverly B. Hayes, District Attorney

Defendant

Defendant's Attorney

PLEA OF DEFENDANT WITHOUT COUNSEL

The defendant, _____, appearing by his own choice without counsel acknowledges that the Judge of the Court has fully advised him of his right to counsel at all stages of the case against him, acknowledges that the Judge has offered and does now offer to appoint an able attorney to act as counsel for defendant, and the defendant has refused to accept the services of such counsel and now so refuses and the defendant, so refusing to have counsel represent him and so refusing to have counsel advise him, does hereby waive copy of Special Presentment and List of Witnesses, does hereby waive formal arraignment, and pleads

This _____ day of _____ 19____

Beverly B. Hayes, District Attorney

Defendant

No. 15

THUGGS Superior Court

APRIL Term, 19 23

THE STATE

vs.

PAUL NEELY, and ALTHA OTIS DANIEL STEPHENS alias SONNY BOY STEPHENS, and alias ALFRED STEPHENS.

BURGLARY

Filed in office this 16th day of November, 1923

Deputy Clerk, Superior Court

Solicitor, Superior Court

Atlanta Judicial Circuit

Solicitor-General, Atlanta Judicial Circuit

Atlanta, Ga., November 16, 1923.

BEVERLY B. HAYES
District Attorney

WITNESSES FOR THE STATE

Josh Wimberly, Jeffersonville, Georgia
Sheriff Earl Hamrick
Mrs. Jack Jones
Bay Branch, Georgia

WITNESSES APPEARING BEFORE THE GRAND JURY

VERDICT

We, the Jury, find the defendant, _____

This _____ day of _____ 19____

Foreman

387-A PORTION OF STATE'S EXHIBIT H

30784. STEPHENS v. THE STATE.

HALL, Justice.

Alpha Otis O'Daniel Stephens was convicted of murder in the Superior Court of Bleckley County on January 20-21, 1975, and sentenced to death. The conviction and sentence are before this court on appeal and for mandatory review of the death sentence.

I. Factual Summary

Stephens escaped from the Houston County, Georgia, jail and sometime thereafter on August 21, 1974, went to the home of Charles Asbell in Twiggs County allegedly accompanied by another man. Charles Asbell was not at home at the time and Stephens broke into the house wherein he located a .357 magnum pistol, which he loaded, and a number of other weapons, which he placed in a 1972 Dodge.

While the burglary was proceeding, Roy Asbell, Charles Asbell's father, drove up in his Ford Ranchero. Stephens' later statement to officers was that Asbell said, "What are you niggers doing in my house?", and seeing rifles in Stephens' automobile, pulled his gun. Stephens ran to Asbell's car, jerked Asbell out of the car, and hit him in the face several times. Asbell begged not to be hit any more. Stephens is 6 feet, 2 inches tall, while Asbell was 5 feet, 6 inches, and at that time Asbell was crippled as the result of a tractor accident. Asbell usually carried several hundred dollars on his person, and when he offered Stephens money in exchange for his life, Stephens took the offered money and kicked Asbell again.

Stephens hit Asbell with the pistol, knocking him back into the Ranchero and told his alleged partner to kill him if he moved. They drove approximately three miles to a

pasture, where they stopped and Asbell got out of the car and tried to escape. He hobbled to an abandoned building being used as a barn, but Stephens took the .357 magnum and ran after him. He took more money from Mr. Asbell and then placed the pistol in his ear and fired twice. Both bullets passed through Asbell's skull and exited at his right temple, causing his death. An autopsy showed that he sustained a broken jaw and several skull fractures.

A trail of evidence connected Stephens to the crime. In pre-trial statements to police, he confessed this crime fully, as well as a string of other serious crimes which he committed after his escape and before the Asbell murder. He presented no defense at trial. During the hearing on sentence, however, he testified that his partner fired the fatal shots.

II. Enumeration of Errors

Although Stephens alleges 14 enumerations of error, he argued only the unconstitutionality of the death penalty. The other enumerations would normally be considered abandoned pursuant to Rule 18 (c)(2) of this court (*Lynch v. State*, 234 Ga. 446, 449 (216 SE2d 307) (1975)), but because this is a death case, this court has carefully studied the enumerations. Our conclusion is that no reversible error has been made to appear by any enumeration. We will consider in more detail, as a part of our sentence review, the allegation that the voir dire testimony was not transcribed.

Stephens attacks the constitutionality of the 1973 death penalty procedure as set forth in Code Ann. §§ 27-2534.1 and 27-2737 (Ga. L. 1973, p. 159 et seq.) because of the discretion it allows in deciding whether or not death should be imposed. This issue was addressed by this court

in the first case decided under the statute (*Coley v. State*, 231 Ga. 829 (204 SE2d 612) (1973)), wherein we determined that the statute is not unconstitutional because it provides for rational discretion and evenhanded justice in narrowing the guidelines under which the penalty may be adjudged. No matter presented by Stephens convinces us to change that determination of constitutionality. See also *McCorquodale v. State*, 233 Ga. 369 (211 SE2d 577) (1974); *House v. State*, 232 Ga. 140 (3) (205 SE2d 217) (1974); *Eberheart v. State*, 232 Ga. 247 (1) (206 SE2d 12) (1974).

III. Sentence Review

We have reviewed the sentence as required by Code Ann. § 27-2537 (c) (1-3) (Ga. L. 1973, p. 159 et seq.), as we did in *Coley v. State*, supra, and in each subsequent case involving the death penalty under this statute. In *Ross v. State*, 233 Ga. 361 (211 SE2d 356) (1974) and in *Owens v. State*, 233 Ga. 869 (214 SE2d 173) (1975), we recognized the need for this court to review the voir dire examination to determine whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, in cases where potential jurors were excused for conscientious scruples against imposition of the death penalty. We must determine if the standards of jury selection applicable in death cases were met as required by Witherspoon v. Illinois, 391 U. S. 510 (88 SC 1770, 20 LE2d 776) (1968), as amplified in Boulden v. Holman, 394 U. S. 478 (89 SC 1138, 22 LE2d 433) (1908), and Maxwell v. Bishop, 398 U. S. 262 (90 SC 1578, 26 LE2d 221) (1969). We permitted supplementation of the trial transcript in *Coker v. State*, 234 Ga. 555 (216 SE2d 782) (1975) to the extent of establishing that no jurors had been excused for conscientious objection to capital punishment. We reach the same decision in this case, where the

voir dire was not transcribed at the time of trial and the trial court supplemented the record pursuant to Code Ann. § 6-805 (d) and (f). The supplement establishes that no prospective juror was excused for cause because he was opposed to the imposition of capital punishment. Although our consideration was not limited to this issue alone, we conclude that the sentence of death imposed here was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

We have considered the aggravating circumstances found by the jury and the evidence concerning the crime introduced in court. The jury found the following statutory aggravating circumstances: (1) The murder was committed by a person with a prior record of conviction for a capital felony; the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Code Ann. § 27-2534.1 (b) (1). (2) The murder was committed by a person who has escaped from the lawful custody of a peace officer and place of lawful confinement. Code Ann. § 27-2534.1 (b) (9).

In *Arnold v. State*, 236 Ga. 534, 542 (1976), we held that "the portion of Code Ann. § 27-2534.1 (b) (1), which allows for the death penalty where a 'murder (is) committed by a person who has a substantial history of serious assaultive convictions,' is unconstitutional and, thereby, unenforceable." In *Arnold*, that was the sole aggravating circumstance found by the jury. In this case, the evidence supports the jury's findings of the other statutory aggravating circumstances, and consequently the sentence is not impaired.

Stephens argues that under the state's new death penalty statute, there is no meaningful basis for distinguishing the few cases in which death is imposed from the

many cases in which it is not, and this was the flaw invalidating the statute in Furman v. Georgia, 408 U. S. 238 (92 SC 2726, 33 LE2d 346) (1972). We cannot agree. In performing the sentence comparison required by Code Ann. § 27-2537 (c) (3), this court uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed. One result of this comparison was shown in *Coley v. State*, 231 Ga. 829, supra, p. 835, in which we ruled that on the facts of that rape case, death was disproportionate to the life penalties imposed by juries confronted with similar circumstances in other rape cases; and another in *Gregg v. State*, 233 Ga. 117, 127 (210 SE2d 659) (1974), in which we ruled similarly that death for armed robbery was disproportionate. A further description of the method by which sentence comparisons are made appears in *Ross v. State*, 233 Ga. 361, 364-367 (211 SE2d 356) (1974). Stephens' contention is without merit.

We have compared the evidence and sentence in this case with similar cases contained in the appendix attached to this opinion. Alpha Otis O'Daniel Stephens' sentence to death for murder is not excessive nor disproportionate to the penalty in similar cases considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except Gunter, J., who dissents.

ARGUED JULY 12, 1976—DECIDED JULY 14, 1976.

Murder. Bleckley Superior Court. Before Judge O'Connor.

Hugh Lawson, for appellant

Albert D. Mullis, District Attorney, Arthur K. Bolton, Attorney General, Harrison Kohler, Staff Assistant Attorney General, for appellee.

Appendix

Similar cases considered by the court: *Henderson v. State*, 227 Ga. 68 (179 SE2d 76) (1970); *Pass v. State*, 227 Ga. 730 (182 SE2d 779) (1971); *Watson v. State*, 229 Ga. 787 (194 SE2d 407) (1972); *Callahan v. State*, 229 Ga. 737 (194 SE2d 431) (1972); *Sirmans v. State*, 229 Ga. 743 (194 SE2d 476) (1972); *Scott v. State*, 230 Ga. 413 (197 SE2d 338) (1973); *Whitlock v. State*, 230 Ga. 700 (198 SE2d 865) (1973); *Kramer v. State*, 230 Ga. 855 (199 SE2d 805) (1973); *Bennett v. State*, 231 Ga. 458 (202 SE2d 99) (1973); *Howard v. State*, 231 Ga. 186 (200 SE2d 755) (1973); *Hunter v. State*, 231 Ga. 494 (202 SE2d 441) (1973); *Morgan v. State*, 231 Ga. 280 (201 SE2d 468) (1973); *House v. State*, 232 Ga. 140 (205 SE2d 217) (1974); *Gregg v. State*, 233 Ga. 117 (210 SE2d 659) (1974); *Floyd v. State*, 233 Ga. 280 (210 SE2d 810) (1974); *Chenault v. State*, 234 Ga. 216 (215 SE2d 223) (1975); *Smith v. State*, 236 Ga. 12 (222 SE2d 308) (1976); *Mason v. State*, 236 Ga. 46 (222 SE2d 339) (1976).

On Motion for Rehearing

Hall, Justice.

The foregoing opinion and judgment were vacated on June 29, 1976 and the case was scheduled for oral argument on July 12, 1976, pursuant to the representations made to this court by counsel for appellant that he did not receive a copy of our February 1976 oral argument calendar showing the scheduling of his case for argument, and did not intentionally waive argument by failing to appear.

Subsequent to our June 29 action, the United States Supreme Court, on July 2, 1976, upheld the constitutionality of the Georgia capital punishment statute against just the kinds of attacks appellant raised on this appeal. Gregg v. Georgia, ____ U. S. ____ (No. 74-6257, decided July 2, 1976). At oral argument on July 12, 1976, after conceding the impact of Gregg upon his arguments, counsel for appellant urged for our consideration only one point – that during voir dire one juror was improperly excused.

The trial record, as supplemented pursuant to Code Ann. § 6-805 (d) and (f), reflects that this juror was struck by the state's using one of its peremptory strikes. Even if the questioning of this juror had been defective under Witherspoon v. Illinois, 391 U. S. 510 (88 SC 1770, 20 LE2d 776) (1968), error would not result because the juror was not excused for cause.

No reason appearing which would call into question our opinion and judgment entered in this case on June 10, 1976, the same are reinstated.

Opinion and judgment reinstated. All the Justices concur, except Gunter, J., who dissents.

33487. STEPHENS v. HOPPER.

PER CURIAM.

The appellant, Alpha Otis O'Daniel Stephens, was convicted of murder in the Superior Court of Bleckley County in January of 1975 and sentenced to death. The conviction and sentence were affirmed in *Stephens v. State*, 237 Ga. 259 (227 SE2d 261) (1976). In April of 1977, he filed a petition for writ of habeas corpus in the Tattnall Superior Court attacking his death sentence on various

constitutional and statutory grounds. The Tattnall Superior Court denied his petition for habeas relief. We granted his application to appeal.

A brief review of the facts and circumstances surrounding the appellant's conviction of murder and sentence to death is necessary to an understanding of the arguments made in his habeas corpus petition.

In August of 1974, the appellant was serving concurrent three-year sentences under multiple convictions for burglaries committed by the appellant in April of 1973. He was being held in the Houston County jail, from which he escaped on August 19th. Before being apprehended on August 22nd, the appellant, in addition to committing a prior armed robbery and burglary, broke into the home of Charles Asbell in Twiggs County and proceeded to burglarize it. As the burglary was under way, Roy Asbell, Charles Asbell's father, drove up. The appellant approached Asbell with a pistol and forced him out of the car. He hit Asbell in the face several times and took several hundred dollars from him. The appellant then hit Asbell with the pistol and forced him back into the car. He drove Asbell approximately three miles, across the county line into Bleckley County, and killed him there by shooting him twice in the head.

In October of 1974, the appellant pleaded guilty in the Superior Court of Twiggs County to an indictment accusing him of committing an armed robbery and a murder in May of 1973. He also pleaded guilty to indictments accusing him of the following offenses arising from the criminal episode at the Asbell residence: one count of burglary, one count of motor vehicle theft, one count of armed robbery, and one count of kidnapping with bodily injury. The count of the indictment charging him with

kidnapping with bodily injury alleged that the appellant, "did unlawfully and with force and arms abduct and steal away Roy Asbell, a person, without lawful authority, and held Roy Asbell against his will and did physically abuse and did inflict and cause bodily injury to the body of Roy Asbell by beating, hitting and kicking Roy Asbell *and did threaten to kill Roy Asbell and then did kill Roy Asbell by shooting Roy Asbell . . .*" (Emphasis supplied.)

The appellant pleaded guilty to the kidnapping-with-bodily-injury indictment in Twiggs County, and he was given a sentence of life imprisonment. He was then placed on trial for the murder of Roy Asbell in Bleckley County. The jury imposed the death penalty, finding as statutory aggravating circumstances: (1) that the offense of murder was committed by a person with a prior record of conviction of a capital felony, Code Ann. § 27-2534.1 (b) (1); (2) that the murder was committed by a person who has a substantial history of serious assaultive criminal convictions, Code Ann. § 27-2534.1 (b) (1), supra; and, (3) that the offense of murder was committed by a person who had escaped from the lawful custody of a peace officer or a place of lawful confinement, Code Ann. § 27-2534.1 (b) (9). Although noting that in *Arnold v. State*, 236 Ga. 534 (7) (224 SE2d 386) (1976) that portion of Code Ann. § 27-2534.1 (b) (1) which authorizes the death penalty where a murder is committed by a person who has a substantial history of serious assaultive convictions had been struck down as unconstitutionally vague, this court affirmed the appellant's death sentence in *Stephens v. State*, supra, as the evidence supported the jury's finding of other statutory aggravating circumstances.

1. In the first enumeration of error, the appellant argues that in view of the allegations of homicide in the

Twiggs County kidnapping-with-bodily-injury indictment, it became necessary for the state to prove that the kidnap victim was killed; therefore, so this argument proceeds, the appellant's subsequent trial, conviction, and sentence for murder in Bleckley County were barred by state and federal constitutional guarantees ensuring due process and prohibiting double jeopardy.

Both the substantive and procedural aspects of this double jeopardy argument are controlled adversely to the appellant by our recent decision in *Potts v. State*, 241 Ga. 67 (11) (243 SE2d 510) (1978).

The starting point for an analysis for any double jeopardy question in this state must begin with Code Ann. §§ 26-505 through 26-507 (Ga. L. 1968, pp. 1249, 1267) and the seminal decision interpreting these statutory provisions, *State v. Estevez*, 232 Ga. 316 (206 SE2d 475) (1974). *Estevez* recognizes that these provisions of the 1968 Georgia Criminal Code provide new, expanded statutory tests for determining double jeopardy questions, thereby rendering inapplicable previous Georgia decisions applying only minimum constitutional standards of double jeopardy. These statutory provisions distinguish between two aspects of double jeopardy—first, limitations upon multiple prosecutions for crimes arising from the same conduct (referred to as the *procedural* bar of double jeopardy); and, second, limitations upon multiple convictions or punishments that may be imposed for such crimes (referred to as the *substantive* bar of double jeopardy).

As to the *procedural* bar of double jeopardy, Code Ann. § 26-506 requires all crimes arising from the same conduct to be prosecuted in a single prosecution provided they are in the same jurisdiction and are known to the prosecutor

unless the court in the interest of justice orders separate trials. Code Ann. § 26-507 sets out in detail when a second prosecution is barred. A prosecution is not barred within the meaning of Code Ann. § 26-507, "if the former prosecution was before a court which lacked jurisdiction over the accused or the crime." Id., subsection (d) (1).

In the present case, it is undisputed that the appellant kidnapped Roy Asbell in Twiggs County, inflicted bodily injury upon him in that county, and then abducted him to Bleckley County and killed him there. As a result, these two offenses were not within a single court's jurisdiction and could not have been tried together. Therefore, there was no procedural bar to the appellant's subsequent prosecution for the murder of Roy Asbell in Bleckley County. *Potts v. State*, supra, 241 Ga. at pp. 77-78.

As to the *substantive* bar of double jeopardy, Code Ann. § 26-506 (a) (1) provides that when the conduct of an accused may establish the commission of more than one crime, the accused may be *prosecuted* for each crime, but he may not be *convicted* of more than one crime, if one crime is included in the other. Code Ann. § 26-505 (a) and (b) provide alternative rules for determining when one crime is included in another. A crime is so included if "[i]t is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged" (Code Ann. § 26-505 (a)), or "[i]t differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission" (Code Ann. § 26-505 (b)). Code Ann. § 26-505 (a) sets out the rules for determining included crimes as a matter of fact, and Code Ann. § 26-505 (b) sets out the

rules for determining included crimes as a matter of law. *Estevez v. State*, supra, 232 Ga. 316.

In *Potts*, supra, we held that murder and kidnapping with bodily injury are not included crimes as a matter of law, citing *Pryor v. State*, 238 Ga. 698, 701 (234 SE2d 918) (1977). However, Potts argued that his murder conviction was included in his kidnapping-with-bodily-injury conviction as a matter of fact, since the kidnapping-with-bodily-injury indictment alleged as the bodily injury the killing of the victim. This is the precise argument the appellant makes in this case. In *Potts* we rejected the argument that the murder charge was, therefore, established by proof of the same or less than all of the facts required to establish the commission of kidnapping-with-bodily-injury charge. We rejected this argument because the state, in order to establish the kidnapping-with-bodily-injury charge, had to prove an unlawful abduction of the victim against his will, which did not have to be proved in order to establish the murder charge; and, in order to establish the murder charge, the state had to prove malice aforethought, which did not have to be proved in order to establish the kidnapping-with-bodily-injury charge. In other words, we held that murder and kidnapping with bodily injury were not included as a matter of fact under the first prong of Code Ann. § 26-505 (a), since these crimes have distinct elements. The first enumeration of error is without merit.

2. In the second enumeration of error, the appellant argues that the failure of the court reporter to transcribe the closing arguments of counsel renders the subsequently imposed death penalty unconstitutional.

It is true that improper statements made by the prosecutor in his closing argument to the jury can cause the

death penalty to be set aside. See *Prevatte v. State*, 233 Ga. 929 (214 SE2d 365) (6) (1975). Therefore, even though not required by statute (Code Ann. § 27-2401), closing arguments of counsel should be taken down in a case in which the state is seeking the death penalty. We are unable, however, to accept the proposition that the failure to transcribe the closing arguments of counsel requires the death penalty automatically to be set aside.

In the present case, it appears as though the closing arguments of counsel were recorded by the court reporter. However, the appellant's trial counsel were informed by the trial judge that it was the practice in that judicial circuit not to transcribe the closing arguments of counsel absent a request from either the state or the defendant. Neither counsel for the state nor counsel for the defendant requested that closing arguments be transcribed. Trial counsel were, however, further informed by the trial judge that if they had any objections to the district attorney's closing argument, the objectionable portion of the argument would be transcribed. No objections were made. An affidavit of the trial judge was received at the habeas corpus hearing, and in that affidavit the trial judge stated that: "In his closing argument, [the district attorney] factually summarized the evidence in the case. He made no allusions to race, nor did he use any epithet in referring to [the appellant]. I recall no statement by [the district attorney] that was inflammatory or that injected passion or prejudice into the trial of [the appellant]." One of the appellant's trial counsel testified at the habeas corpus hearing, and he did not claim that the district attorney stated anything objectionable in closing argument. During oral argument before this court appellate counsel was not aware of anything objectionable stated by the district attorney during closing argument

at trial.

We find this enumeration of error to be without merit, primarily because the appellant has failed to demonstrate any harm or prejudice resulting from the failure of the court reporter to transcribe closing arguments. See *Robinson v. State*, 229 Ga. 14 (189 SE2d 53) (1972). See also *Sims v. Smith*, 228 Ga. 136 (184 SE2d 347) (1971).

3. In the third enumeration of error, the appellant argues that the death penalty must be set aside because the trial court's instructions to the jury were in violation of *Fleming v. State*, 240 Ga. 142 (7) (240 SE2d 37) (1977), in that the jurors were not clearly informed that they had the authority to impose a life sentence even though they found the existence of statutory aggravating circumstances.

Although the alleged failure of this charge to comply with the sentencing portion of our capital punishment statute (Code Ann. § 27-2534.1) claims a substantial denial of rights under Georgia law and thereby asserts a claim cognizable on habeas corpus (Code Ann. § 50-127 (1)), nonetheless the state argues that the failure of the appellant to object to the charge at trial constitutes a waiver and precludes him from raising the issue in habeas corpus proceedings. This argument raises the question whether sentencing charges on death cases will be reviewed by this court on habeas corpus when not preserved by proper objection.

The general rule is that jury charges are not reviewable on habeas, although a charge which is so defective as to render the trial fundamentally unfair is reviewable in habeas corpus proceedings (*Byrd v. Hopper*, 234 Ga. 248 (215 SE2d 251) (1975)), even though unobjected to at trial. *Parrish v. Hopper*, 238 Ga. 468 (233 SE2d 161)

(1977). This court always has the *power* to review charges whether objected to or not. *Parrish v. Hopper*, supra, and concurring opinion of Justice Hall.

We conclude that in a death case the sentencing charge is so crucial to the outcome of the trial that we will exercise our power to review those charges when the issue is placed before us on habeas, whether objection was made in the trial court or not.

Considering on the merits the charge given Stephens' jury in the sentencing phase, we find that the jurors were actually informed of their responsibility under the death penalty statute, as required by *Fleming*, supra, and *Hawes v. State*, 239 Ga. 630 (238 SE2d 418) (1977), as well as our more recent decision in *Spivey v. State*, 241 Ga. 477 (1978). The charge was not erroneous.

4. In the fourth enumeration of error, the appellant argues that one of the statutory aggravating circumstances under which the death penalty was imposed was improperly invoked by the state.

The statutory aggravating circumstance complained of is found in Code Ann. § 27-2534.1 (b)(1), which provides in pertinent part that "[t]he offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony . . ." The appellant argues that at the time he committed the murder of Roy Asbell he did not have a "prior record of conviction for a capital felony." Although the appellant was convicted of a murder and two armed robberies committed prior to the date that he murdered Roy Asbell, these convictions were not obtained until after the murder of Roy Asbell was committed.

This argument raises the question whether, in deciding if the the [*sic*] appellant has "a prior record of conviction for a

capital felony" the jury should consider his record as of the moment of the crime or as of the time of sentencing. We conclude the latter was intended by the legislature, and at the time of his sentencing Stephens' jury could correctly find that he had such a record. To conclude otherwise would produce the intolerable result that an offender with no prior record could commit numerous separate murders one after the other before being apprehended, and then, at the trials for those murders, could *never* receive death under this aggravating circumstance even though convicted of each and every one of the murders.

The evidence supports this aggravating circumstance.

5. Finally, the appellant argues that since, under *Arnold v. State*, 236 Ga. 534, supra, one aggravating circumstance found by the jury is unconstitutionally vague, the death penalty cannot stand, because presenting evidence to the jury to support that invalid aggravating circumstance was prejudicial error.

The evidence introduced by the state was the appellant's criminal record. Code Ann. § 27-2503 (b) (Ga. L. 1974, pp. 352, 357) provides in part: "In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section." Under Code Ann. § 27-2503 (a), the record of any prior criminal convictions of the defendant, if made known to the defendant prior to his trial, is admissible. The record of the appellant's prior criminal convictions was, therefore, admissible in the penalty phase of this

trial. This final enumeration of error is without merit.

Judgment affirmed. All the Justices concur, except Undercofler, P. J., who concurs specially, Hill, J., who also concurs in the judgment, except that as to Divisions 1 and 4 he concurs in the judgment only, and Marshall, J., who concurs specially as to Division 1 and dissents as to Division 4.

ARGUED MAY 8, 1978—DECIDED JULY 6, 1978—
REHEARING DENIED JULY 20, 1978.

Habeas corpus. Tattnall Superior Court. Before Judge Harvey.

James C. Bonner, Jr., Hugh Lawson, for appellant.

Arthur K. Bolton, Attorney General, Harrison Kohler, Assistant Attorney General, for appellee.

UNDERCOFLER, Presiding Justice, concurring specially.

I believe Division 1 of the majority opinion can be stated more concisely as follows:

1. Separate prosecutions for crimes arising from the same criminal transaction are barred generally. They are not barred where the court lacks jurisdiction or the court orders separate trials in the interest of justice. Code Ann. § 26-506 (b) (c).

2. Separate punishment (conviction) of a crime is barred where it is included as a matter of law in another crime for which the defendant has been convicted. Crimes are included as a matter of law by statute or judicial decisions.

3. Separate punishment (conviction) of a crime is barred when it was included as a matter of fact in proving another crime for which the defendant has been convicted.

(a) When the elements of the separate crimes have been proved by additional and distinct facts, the crimes are not included as a matter of fact and the defendant may be convicted of both crimes. In such case, the proof may overlap in part, but the proof of either crime does not encompass the other. *Potts v. State*, 241 Ga. 67 (243 SE2d 510) (1978).

(b) When all, or less than all, the facts which were necessary to prove one crime are the only facts which proved the other crime the latter crime is included as a matter of fact and the conviction of the latter crime is barred. In such case, the proof of the included crime is encompassed by the proof of the other crime. *State v. Estevez*, 232 Ga. 316 (206 SE2d 475) (1974).

4. *Allen, Burke, Zilinmon, Williams* and *Pryor* are not inconsistent with *Potts*. The hypothetical case in *Pryor* should be disregarded.

MARSHALL, Justice, concurring specially as to Division 1 and dissenting as to Division 4.

1. I agree with the holding in Division 1 of the majority opinion that the appellant's substantive and procedural double jeopardy arguments are controlled adversely to him by our decision in *Potts*. However, I would add the following to what has been stated in Division 1 of the court's opinion.

I believe that our decision in *Potts* signaled a shift from the method of analysis previously used by this court in determining whether a crime is established by proof of the same or less than all the facts required to establish the commission of another crime, within the meaning of Code Ann. § 26-505 (a). In making this determination, *Estevez* and a line of cases following it (*Allen v. State*, 233 Ga. 200

(3) (210 SE2d 680) (1974); *Burke v. State*, 234 Ga. 512 (2) (216 SE2d 812) (1975); *Zilinmon v. State*, 234 Ga. 535 (8) (216 SE2d 830) (1975); *Williams v. State*, 238 Ga. 244 (7) (232 SE2d 238) (1977); *Pryor v. State*, 238 Ga. 698 (1) (234 SE2d 918) (1977)), look to the actual evidence introduced at trial. These cases hold, in effect, that if the state uses up all the evidence that the defendant committed one crime in establishing another crime, the former crime is included in the latter as a matter of fact under Code Ann. § 26-505 (a).

However, in *Potts*, we looked not to the actual evidence adduced at trial, but to the evidence required to establish each element of the crime, in determining whether two crimes are included under the first prong of Code Ann. § 26-505 (a).

Concededly, in the vast majority of cases, utilization of one or the other approach would produce the same result. However, the difference in the two approaches, albeit subtle, has the potential for producing drastically different results, as in *Potts* where it could have meant the difference between the affirmance or setting aside of a death sentence. For in *Potts* we held, correctly I believe, that even though the kidnapping-with-bodily-injury indictment alleged the killing of the victim as the bodily injury sustained, the offense of murder was not established by proof of less than all the facts required to establish the offense of kidnapping with bodily injury, since the state had to prove malice aforethought in order to convict the defendant of murder. However, as we are all aware, the element of malice aforethought, which must be present before a killing can constitute murder, can be either express or implied. The evidence of malice in *Potts* may well have been implied, in which case there would have been

no independent evidence of malice other than the circumstances surrounding the defendant's killing of the victim. In this latter event, under *Estevez* and its progeny, the evidence required to convict of kidnapping with bodily injury would have been the only evidence showing the defendant's murder of the victim; therefore, murder would have been included in the crime of kidnapping with bodily injury under Code Ann. § 26-505 (a).

Furthermore, under traditional double jeopardy analysis, the "distinct elements" test is the standard used in determining whether one crime is included in another as a matter of law. See Blockburger v. United States, 284 U. S. 299 (52 SC 180, 76 LE 306) (1932); Gavieres v. United States, 220 U. S. 338 (31 SC 421, 55 LE 489) (1911); Burton v. United States, 202 U. S. 344 (26 SC 688, 50 LE 1057) (1906). This is the test this court adopted in *Potts* for determining included crimes under the first prong of Code Ann. § 26-505 (a) as a matter of fact. In my opinion, continuing to speak of Code Ann. § 26-505 (a) as setting out the rules for determining included crimes as a matter of fact and Code Ann. § 26-505 (b) as setting out the rules for determining included crimes as a matter of law, becomes somewhat muddlesome. I would hold, quite simply, that the first prong of Code Ann. § 26-505 (a) establishes the "same evidence" test as one of several alternative tests for determining the limitations for multiple punishments for crimes arising from the same conduct of the accused, and Code Ann. § 26-507 adopts the "same transaction" test for determining limitations upon successive prosecutions for such crimes.

The "same evidence" test and the "same transaction" test are the predominant tests used by the courts in this country in resolving double jeopardy questions as a

matter of constitutional law. The great deal of confusion which has been engendered by the double jeopardy proscriptions of the Federal and State Constitutions is largely attributable to the fact that the courts have adopted either one or the other test for determining both substantive and procedural double jeopardy questions. In my opinion, the first prong of Code Ann. § 26-505 (a) adopts the "same evidence" test for the resolution of substantive double jeopardy questions, and Code Ann. § 26-507 adopts the "same transaction" test for the resolution of procedural double jeopardy questions. As to the procedural aspect of the double jeopardy bar, the 1968 Criminal Code thus extends to the accused more protection than the Constitution requires. Compare Brown v. Ohio, 432 U. S. 161 (97 SC 221, 53 LE2d 187) (1977) (Brennan and Marshall, JJ., concurring); Thompson v. Oklahoma, 429 U. S. 1053 (97 SC 768, 50 LE2d 770) (1977) and cits.

2. In Division 4, the appellant argues that one of the statutory aggravating circumstances under which the death penalty was imposed is not supported by the evidence. The statutory aggravating circumstances complained of is found in Code Ann. § 27-2534.1 (b) (1), which provides in pertinent part, that: "[t]he offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony. . ." The convictions of the appellant for other capital felonies were not obtained until after the appellant committed the murder of Roy Asbell. Therefore, the murder of Roy Asbell was not committed by a person with a prior record of conviction for a capital felony, as clearly specified in the statute. In holding that it was, a majority of this court violate the cardinal rule of statutory construction that where a statute is plain and susceptible

of but one natural and reasonable construction, the court has no authority to place a different construction upon it, but must construe it according to its terms. *Rayle Elec. Membership Corp. v. Cook*, 195 Ga. 734 (2) (25 SE2d 574) (1943); *State Revenue Comm. v. Brandon*, 184 Ga. 225, 228 (190 SE 660) (1937) and cits.; *Barnes v. Carter*, 120 Ga. 895, 898 (48 SE 387) (1904); *Ezekiel v. Dixon*, 3 Ga. 146, 158 (1847).

The majority arrive at this construction of the statute by envisioning a hypothetical situation in which an offender with no prior record commits numerous separate murders before being apprehended. The majority note that if we construe this statutory aggravating circumstances as referring to the defendant's record at the time the crime was committed, rather than at the time of the trial, the defendant in the hypothetical situation could not receive the death penalty (unless of course, another statutory aggravating circumstance was present). The majority deem this an "intolerable result" and, therefore, conclude that the legislature did not intend it. What the majority ignore is that another portion of Code Ann. § 27-2534.1 (b) (1) authorizing imposition of the death penalty where "[t]he offense of murder . . . was committed by a person . . . who has a substantial history of serious assaultive criminal convictions" would cover the hypothetical situation, had it not been for the fact that it was struck down by this court in *Arnold v. State*, supra. The majority construe the portion of Code Ann. § 27-2534.1 (b) (1) under review to mean neither what it says nor what the legislature intended it to mean. The majority construe it to mean what the legislature intended by the enactment of that portion of the statute struck down in *Arnold*. In so doing, I think that this court invades the province of the legislature. I respectfully dissent as to Division 4.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

ALPHA OTIS O'DANIEL STEPHENS, *Petitioner,*	}	CIVIL NO.
vs.		
SUPERINTENDENT WALTER ZANT, *Respondent.*		_____

PETITION FOR A WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C. 2254 and the Rules governing such cases, Alpha Otis O'Daniel Stephens, by counsel, respectfully petitions this Court for a writ of habeas corpus directed to the Respondent.*

A. The Respondent is the Superintendent of the Georgia Diagnostic and Classification Center in Jackson, Georgia and there, within the jurisdiction of this Court, he is holding the Petitioner. [3] He holds the Petitioner, inter alia, under a sentence of death which [1] the Bleckley Superior Court pronounced upon him on [2] 21 January 1975 following his [6] jury trial and conviction after this [5] plea of not guilty to [4] an indictment for the murder of one Roy Asbill.

B. [7] The Petitioner testified in his own defense at trial.

C. [8] Following his conviction and sentence, the Petitioner took a direct appeal [9] to the Supreme Court of Georgia which, on 14 July 1976, affirmed the judgment,

*The figures in brackets refer to the specific paragraphs designated in the form approved for use in this District. For greater clarity, the order in which the information appears has been somewhat rearranged.

Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, cert. den., 429 U.S. 986 (1976).

D. [10] Thereafter the Petitioner sought [11(a)(2)] a state writ of habeas corpus in [11(a)(1)] the Tattnall Superior Court [11(a)(3)] on the grounds that his conviction and sentence violated his rights under the Fifth and 14th Amendments not to be placed twice in jeopardy for the same offense, that they violated his rights under the Eighth and 14th Amendments not to be deprived of his life except upon due process of law and in proceedings free of arbitrary and capricious influences, that his sentence was infected by improper, prejudicial, and arbitrary influences, that his sentence was reviewed and sustained on an incomplete record which lacked the transcript of the prosecutor's arguments to the jury, and that his sentence rested in part upon an invalid basis.

E. [11(a)(4)] Following an evidentiary hearing, the Superior Court [11(a)(5)] dismissed the writ [11(a)(6)] on 14 December 1977. [11(d)] The State Supreme Court affirmed this judgment on appeal, *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92 (1978), cert. den., ____ U.S. ___ (27 November 1978). The State Supreme Court did not address a special enumeration of error directed toward the proportionality of the sentence in comparison to an earlier sentence for kidnapping.

F. (i) The Petitioner's conviction and sentence are void under the Fifth and 14th Amendments of the Constitution of the United States because they constitute double jeopardy.

(ii) The homicide for which the Petitioner stands convicted was the murder of Roy Asbill on 21 August 1974 evidently a short distance over the Twiggs-Bleckley county line. It culminated a series of crimes which the

Petitioner committed in Twiggs County during 20-21 August 1974.

(iii) Those crimes included the theft of Mr. Asbill's car, robbing him, and kidnapping him with bodily injury.

(iv) The Petitioner pleaded guilty to these charges in the Twiggs Superior Court on 17 October 1974. He was sentenced to various terms of imprisonment including life imprisonment for kidnapping. The Petitioner could have been, but was not, sentenced to death under his plea to the indictment for this crime. None of these convictions or sentences has been set aside.

(v) The kidnapping count alleged, by way of the aggravation necessary under Georgia Code Ann. 26-1311 in order to render the crime punishable by life imprisonment or death, that the Petitioner:

> "in the county aforesaid [Twiggs County] . . . held Roy Asbill against his will and did physically abuse and did inflict and cause bodily injury to [him] by beating, hitting, and kicking [him] and did threaten to kill . . . and then did kill Roy Asbill by shooting [him]."

(vi) When in January 1975 the Petitioner was tried, convicted, and sentenced to death in Bleckley County for murdering Roy Asbill, he had already been placed in jeopardy of his life for the very same homicide in the Twiggs Superior Court because:

> (a) The allegation of the Twiggs indictment constituted a felony-murder charge under Georgia law, that is, causing the homicide of Roy Asbill during the course of kidnapping him.
>
> (b) The Twiggs indictment, to which the Petitioner fully confessed, alleged venue of the homicide in Twiggs County and barred the State from later attempting to impeach its own charges by proof otherwise.

(c) The particular allegation of the Twiggs indictment specifically included the homicide as part of the bodily injury aggravating the kidnapping and thus incorporated his murder as an element of that offense.

G. (i) The Petitioner's death sentence stands in violation of his rights under the Eighth and 14th Amendments not to be deprived of his life except upon due process of law and except in proceedings not influenced by arbitrary and capricious considerations.

(ii) Although the Petitioner's jury was instructed that it must find at least one statutory aggravating circumstance before it could impose a death sentence, it was not instructed that even if it found such a circumstance it need not impose death.

(iii) Although no death sentence may constitutionally be imposed without safeguards which eliminate the capricious and arbitrary infliction of the penalty and which preclude passionate and prejudicial influences, the Petitioner's sentence was imposed, reviewed, and sustained without them and it was infected by improper and arbitrary influences.

(iv) For example, the sentence was reviewed and sustained on an incomplete record which omitted the voir dire of the jury and the prosecutor's arguments to the jury.

(v) And the jury set the sentence partially on the basis that the murder was committed by one with a substantial history of serious, assaultive convictions, a standard which the State Supreme Court has set aside as unconstitutionally vague.

(vi) The jury also set the sentence partially on the basis that the crime was committed by a person with a prior record of conviction for a capital felony, but in fact

the Petitioner had no such prior record at the time he committed the homicide.

(vii) The jury was not instructed that they must unanimously concur on each basis of the sentence and it is therefore impossible to determine whether a death sentence would have been imposed if the grounds in subparagraphs v and vi had not been considered.

H. The Petitioner's death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment because it is disproportionate to the life sentence he received in Twiggs County for essentially the same offense.

I. [14] The Petitioner has no other legal action pending in court.

J. [15] The Petitioner's appointed counsel in the Twiggs proceedings was Maurice Byers, P.O. Box 952, Dublin, Georgia 31021. Hugh Lawson, 328 Commerce Street, Hawkinsville, Georgia represented him by appointment through the direct proceedings in the Bleckley case and thereafter in the collateral proceedings in the Tattnall Superior Court. Until his appointment to the position of District Attorney, Phillip West, P.O. Box 571, Eastman, Georgia was co-counsel with Mr. Lawson during the Bleckley trial. James C. Bonner, Jr., Prisoner Legal Counseling Project, 475 North Lumpkin Street, Athens, Georgia 30601 joined Mr. Lawson as co-counsel in the collateral proceedings.

WHEREFORE, the Petitioner respectfully requests that this Court grant the Petitioner the relief to which

he may be entitled and direct that his conviction for murder and his sentence of death be set aside.

/s/ HUGH LAWSON
Counsel for the Petitioner

/s/ JAMES C. BONNER, JR.
Counsel for the Petitioner

UNIVERSITY OF GEORGIA SCHOOL OF LAW
LEGAL AID AND DEFENDER SOCIETY
PRISONER LEGAL COUNSELING PROJECT
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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

ALPHA OTIS O'DANIEL STEPHENS, *Petitioner*, V. SUPERINTENDENT WALTER ZANT, Georgia Diagnostic & Classification Center, *Respondent.*	CIVIL ACTION NO. 79-30-MAC

JUDGMENT

Pursuant to the Ruling of this Court dated and filed May 11, 1979, and for the reasons stated therein, the petition for a writ of habeas corpus is denied.

This 11th day of May, 1979.

WALTER F. DOYLE, Clerk

By: /s/ HELEN F. NEWBERRY
HELEN F. NEWBERRY
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ALPHA OTIS O'DANIEL STEPHENS, *Petitioner,* V. SUPERINTENDENT WALTER ZANT, Georgia Diagnostic & Classification Center, *Respondent.*	CIVIL ACTION NO. 79-30-MAC

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner Alpha Otis O'Daniel Stephens, a state prisoner under the death sentence for murder, seeks habeas corpus relief pursuant to 28 U.S.C.A. § 2254. Stephens was convicted and sentenced to death by the Bleckley County Superior Court and the verdict and sentence was affirmed by the Georgia Supreme Court. *Stephens v. State*, 237 Ga. 259, 227 S.E. 2d 261 (1976), *cert. denied*, 429 U.S. 986, 97 S.Ct. 508, 50 L.Ed. 2d 599 (1976). A prior state petition for habeas corpus was denied by the Tattnall County Superior Court, *Stephens v. Hopper*, No. 77-94 (Dec. 14, 1977), and this denial of relief was likewise affirmed by the Georgia Supreme Court, *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92 (1978), *cert. denied.*

On February 8, 1979 this court stayed the impending execution so that this petition might be heard and decided. The petitioner alleges as grounds for relief that (1) the murder conviction is violative of the double jeopardy clause of the Fifth Amendment, (2) the closing arguments of the district attorney which allegedly contained prejudicial remarks was [*sic*] not transcribed; and (3) the imposition of the death penalty is violative of the peti-

tioner's Eighth and Fourteenth Amendment rights. All these grounds have been presented to the state tribunals; consequently exhaustion of state remedies is not an issue.

The circumstance which lead [*sic*] to petitioner's murder conviction began on August 19, 1974 when Stephens escaped from the Houston County jail where he was being held on other escape charges. He stole a car and went to Macon, Georgia where he stole another car and committed a burglary. On August 21, 1974 he went to the residence of Charles Asbell in Twiggs County and began burglarizing the house. Among the items he took was a .357 magnum pistol. As Stephens and his accomplice were burglarizing the home, Charles Asbell's father, Roy Asbell, drove up and asked the two men what they were doing. The petitioner, armed with the pistol, assaulted Asbell by hitting and kicking him and took a large sum of money from him. The petitioner forced Asbell into his vehicle and drove him a short distance across the county line into Bleckley County where Stephens shot Asbell twice in the head, killing him. The petitioner drove Asbell's vehicle to Savannah and the next day was apprehended by Savannah police on other charges. He later confessed to a number of burglaries as well as the kidnapping and murder of Roy Asbell.

On October 14, 1974 the petitioner was indicted by the Twiggs County grand jury for the armed robbery and kidnapping-with-bodily-injury of Roy Asbell, as well as various burglary charges and the murder of one Louise Mercer. Among the assaultive acts alleged in connection with the kidnapping-with-bodily-harm charge was that Stephens shot and killed the victim. The petitioner pled guilty to all offenses and was sentenced to three consecutive life sentences as well as various other terms. In

November, Stephens was indicted by the Bleckley County grand jury for the murder of Roy Asbell. Following a plea of not guilty he was tried, convicted and sentenced. The death sentence was imposed after the jury found that the murder was committed by a person with a prior conviction for a capital felony, by a person with a prior history of serious assaultive criminal convictions and by a person who had escaped from the lawful custody of a peace officer and place of lawful confinement. *Ga. Code Ann.* § 27-2534.1(b). The Georgia Supreme Court set aside the death penalty on account of prior assaultive convictions but otherwise affirmed the conviction and death sentence. *Stephens v. State, supra.*

I. FORMER JEOPARDY

The petitioner argues that his guilty plea to kidnapping-with-bodily-harm (*Ga. Code Ann.* § 26-1311) in Twiggs County is a bar to prosecution for murder in Bleckley County on the grounds that the kidnapping and murder charges arose from the same acts and the homicide of Asbell was one of the acts of bodily harm in the kidnapping indictment. The Georgia Supreme Court rejected this argument reasoning that there was no procedural bar to the murder prosecution since Stephens could not be tried in Twiggs County for a murder that took place in Bleckley County. The court also held that there was no substantive bar to the prosecution because kidnapping-with-bodily-injury and murder are not included offenses and are established by the proof of different facts. *Stephens v. Hopper, supra.* This court defers to the Georgia Supreme Court's decision insofar as it rests on a construction of state law; however, this court must decide the question measured against the Fifth Amendment's double jeopardy prohibition.

The double jeopardy clause of the Fifth Amendment

provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This clause has been incorporated into the due process clause of the Fourteenth Amendment and constitutes a limitation of the states' power. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). As explained by the United States Supreme Court:

> " . . . where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306, 309 (1932). *See also Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), *United States v. Smith*, 574 F.2d 308 (5th Cir. 1978).

This court is convinced that the double jeopardy prohibition has not been violated. The kidnapping-with-bodily-harm and the murder charge are offenses defined by separate statutes with different elements. In Georgia, kidnapping-with-bodily-harm requires the prosecution to show that the defendant abducted another person without legal authority and held the person against his will and in addition requires that the victim have received bodily injury from the abduction. *Ga. Code Ann.* § 26-1311. Murder, on the other hand, is the unlawful taking of the life of another with malice aforethought. *Ga. Code Ann.* § 26-1101. Clearly then, the two offenses require proof of different facts and are not the same within the meaning of the Fifth Amendment. The petitioner, nevertheless, argues that because the killing of Asbell was included as one of the acts of bodily injury in the kidnapping indictment jeopardy attached with the petitioner's guilty plea. This

argument is without merit. The double jeopardy clause requires the court to examine the elements of the offenses and to determine what facts are necessary to sustain a conviction. Homicide is not a necessary element of kidnapping-with-bodily-injury. Furthermore, the kidnapping-with-bodily-injury charge was adequately supported by the allegations of beating, hitting, and kicking set forth in the indictment.

II. ABSENCE OF TRANSCRIPT OF DISTRICT ATTORNEY'S CLOSING ARGUMENT

The petitioner alleges that the district attorney made prejudicial remarks during the closing argument and that the court failed to have the argument transcribed. He alleges that the court failed to have the voir dire transcribed. At the state habeas hearing the respondent produced the affidavit of the trial judge who stated that at the time of the trial it was the practice of his circuit not to transcribe voir dire or arguments of counsel absent a request and that no request was made by either of petitioner's attorneys despite the fact both knew of the rule. The trial judge also stated that the district attorney "made no allusions to race nor did he use any epithet in referring to" the petitioner. He recalled no prejudicial or inflammatory statements.

The petitioner has failed to demonstrate any error that would form the basis for habeas relief.

III. THE DEATH PENALTY WAS NOT IMPOSED CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS

The United States Supreme Court has upheld Georgia's statutory scheme for the imposition of the death sentence

against a constitutional attack under the Eighth and Fourteenth Amendments. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). All the procedures set fo h in those statutes were observed in this case. The jury found beyond a reasonable doubt two statutory aggravating circumstances that the murder was committed by a person with a prior record for a conviction of a capital felony, *Ga. Code Ann.* § 27-2534.1(b)(1), and by a person who had escaped from lawful custody of a police officer. *Ga. Code Ann.* § 27-2534.1(b)(9). These findings are supported by the evidence and either finding is grounds for the imposition of the death sentence. On mandatory review to the Georgia Supreme Court, *Ga. Code Ann.* § 27-3537, the court held that the sentence was not the result of passion or caprice nor was the sentence "excessive or disproportionate to the penalty in similar cases considering both the crime and the defendant." This court must agree with these conclusions.

Accordingly, the petition for a writ of habeas corpus is hereby denied.

The stay of execution issued on February 8, 1979 shall remain in force and effect until such time as respondents move for dissolution on account of petitioner's failure to appeal or affirmance after appeal.

SO ORDERED, this 11th day of May, 1979.

/s/ WILBUR D. OWENS, JR.
WILBUR D. OWENS, JR.
United States District Judge

Alpha Otis O'Daniel STEPHENS,
Petitioner-Appellant,

v.

Walter ZANT, Superintendent,
Respondent-Appellee.

No. 79-2407.

United States Court of Appeals,
Fifth Circuit.

Nov. 26, 1980.

Appeal from the United States District Court for the Middle District of Georgia.

Before INGRAHAM, RONEY, and THOMAS A. CLARK, Circuit Judges.

RONEY, Circuit Judge.

Petitioner, convicted of murder and sentenced to death by the State of Georgia, appeals from a denial of a writ of habeas corpus. Petitioner contends his conviction violates the Double Jeopardy Clause and his sentence is invalid under the Eighth Amendment because closing arguments were not transcribed, the jury was not properly instructed that it could recommend a life sentence if it found aggravating circumstances, and the jury was permitted to consider an unconstitutional aggravating circumstance. Although we reject his other contentions, we agree that because the jury considered an unconstitutional aggravating circumstance, petitioner's death sentence cannot stand.

In August of 1974, petitioner escaped from jail where he was serving sentences for earlier burglary convictions. He committed a number of crimes in Twiggs County,

Georgia. While petitioner and an accomplice were burglarizing a house, Roy Asbell drove up in his car. Petitioner forced Asbell at gunpoint from the car, hit him several times in the face and took a large sum of money from him. Petitioner then forced Asbell back into the car and drove him approximately three miles, across the county line into Bleckley County. There, petitioner killed Asbell by shooting him twice in the head at close range.

Shortly thereafter petitioner was apprehended and was indicted by the Twiggs County grand jury for motor vehicle theft, armed robbery and kidnapping with bodily injury. Petitioner pleaded guilty in Twiggs Superior Court and was sentenced to ten years for motor vehicle theft and to life sentences for armed robbery and kidnapping.

Afterwards petitioner was indicted in Bleckley County for the murder of Roy Asbell, found guilty and sentenced to death. His conviction and sentence were affirmed on direct appeal to the Georgia Supreme Court. *Stephens v. State*, 237 Ga. 259, 227 S.E.2d 261, *cert. denied*, 429 U.S. 986, 97 S.Ct. 508, 50 L.Ed.2d 598 (1976). His state petition for a writ of habeas corpus was denied. *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, *cert. denied*, 439 U.S. 991, 99 S.Ct. 593, 58 L.Ed.2d 667 (1978). Petitioner then sought a writ of habeas corpus in federal court, alleging the same constitutional flaws as were raised in state court. The district court denied relief. Petitioner appeals, his execution having been stayed pending appeal.

Petitioner asserts four errors in his conviction and sentence: (1) jeopardy for the murder charge attached when he pleaded guilty to the kidnapping charge and therefore his subsequent murder trial was constitutionally barred; (2) the court failed to transcribe closing arguments and *voir dire;* (3) the instruction to the jury did not adequately

charge that they could still impose life imprisonment even if they found aggravating circumstances that would justify the death sentence; and (4) when one of the three aggravating circumstances found by the jury was later declared unconstitutionally vague, the sentence should not have been affirmed on the basis of the other two.

I. DOUBLE JEOPARDY

The Twiggs County indictment for kidnapping recited that he killed the kidnap victim. The third count reads as follows:

COUNT III

> And the aforesaid Grand Jurors . . . charge and accuse Alpha Otis O'Daniel Stephens . . . with the offense of KIDNAPPING for that the said Alpha Otis O'Daniel Stephens . . . in the county aforesaid . . . did unlawfully and with force and arms abduct and steal away Roy Asbell, a person, without lawful authority, and held Roy Asbell against his will and did physically abuse and did inflict and cause bodily injury to the body of Roy Asbell by beating, hitting and kicking Roy Asbell and did threaten to kill Roy Asbell and then did kill Roy Asbell by shooting Roy Asbell, contrary to the laws of said State . . . .

Petitioner argues that by stating that in the course of the kidnapping he killed Asbell, the State unwittingly accused him of the crime of murder because the indictment alleged all the elements of murder. When he pled guilty under Count III of the Twiggs indictment, he admitted every fact averred in the indictment. At that point, his argument continues, he ran the risk—*i.e.*, was placed in jeopardy—of a conviction of murder under a felony—murder theory. Since under Georgia law felony murder and malice murder are different ways in which one offense

may be committed, *Leutner v. State*, 235 Ga. 77, 218 S.E.2d 820 (1975), he argues the State was barred by the Double Jeopardy Clause from prosecuting him for malice murder in Bleckley County.

The Supreme Court of Georgia responded to petitioner's argument by holding that malice murder and kidnapping are not the same in law or in fact and thus are not the same offense under state law. It also determined that the state legislature intended, under the test in Ga. Code Ann. §§ 26–505 to 507, to permit multiple prosecutions and punishments in a case such as this. *Stephens v. Hopper*, 241 Ga. at 598–600, 247 S.E.2d at 94–95. *Cf. Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (holding that the Double Jeopardy Clause prohibits courts from imposing greater penalties than the legislature intended).

While this is the definitive interpretation of Georgia law and binding upon this Court, *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 1885, 44 L.Ed.2d 508 (1975), the holding does not adequately respond to petitioner's argument. Petitioner's contention is not that kidnapping and malice murder are the "same offense." Rather, he asserts that felony murder was charged in the indictment, that by pleading guilty he was placed in jeopardy of conviction for that crime and therefore the state is barred from any further attempt to prosecute him for murder.

[1, 2] Petitioner's contention that he was placed in jeopardy of a conviction for murder in Twiggs County is erroneous, because there was no jurisdiction in that county to try him for the homicide. The rule is absolute that a person is not put in jeopardy unless the court in which he was tried the first time had jurisdiction to try

him for the charge the person now seeks to avoid. The Supreme Court has twice spoken to the point.

> We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged.

Grafton v. United States, 206 U.S. 333, 345, 27 S.Ct. 749, 751, 51 L.Ed. 1084 (1907).

> An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense.

United States v. Ball, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300 (1896).

The Georgia Constitution requires that, unless an impartial jury cannot be obtained, "all criminal cases shall be tried in the county where the crime was committed." Ga. Const. Art. VI, § XIV, ¶ VI (Ga. Code Ann. § 2-4306). The Supreme Court of Georgia specifically held in this case that the Twiggs County court did not have jurisdiction to try the murder offense. *Stephens v. Hopper*, 241 Ga. at 599, 247 S.E.2d at 95. The Fifth Circuit held in *Tennon v. Ricketts*, 574 F.2d 1243, 1245 (1978), *cert. denied*, 439 U.S. 1091, 99 S.Ct. 874, 59 L.Ed.2d 57 (1979), that "it is for the Georgia Supreme Court, not this Court, to expound the decisional rules of that, jurisdiction." *Accord*, *Hortonville Joint School District No. 1 v. Hortonville Education Assn.*, 426 U.S. 482, 488, 96 S.Ct. 2308, 2312, 49 L.Ed.2d 1 (1976); *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 1885, 44 L.Ed.2d 508 (1975); *Eisenstadt v. Baird*, 405 U.S. 438, 441–42, 92 S.Ct. 1029, 1032, 31 L.Ed.2d 349 (1972) (all holding that the highest state court is the final authority on questions of state law and

federal courts are bound to accept its interpretation of state law).

[3] The question of the jurisdiction of a state trial court in a state criminal prosecution is clearly a question of state law, which binds this Court. Since the Twiggs Superior Court had no jurisdiction to hear the murder offense, petitioner was not placed in jeopardy of a murder conviction, under either a malice murder or felony murder theory, in the Twiggs County proceedings.

[4] Petitioner was, however, placed in jeopardy for the offense of kidnapping with bodily injury. The Double Jeopardy Clause bars a subsequent prosecution for any offense deemed the "same offense" under the test in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

The Supreme Court held in *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), that a lesser or greater included offense is the "same offense" for double jeopardy purposes. It thus becomes necessary to determine whether petitioner's murder conviction was for the "same offense" as his kidnapping charge.

[5] Malice murder and kidnapping with bodily injury have separate and distinct elements and require proof of different facts. Kidnapping consists of abducting another unlawfully and against his will, plus inflicting some bodily injury. Malice murder consists of killing another with malice aforethought. Thus, even if they involve the same transaction and considerably overlap each other factually,

they are not the "same offense" under *Blockburger*. In addition, as found by the Georgia Supreme Court, the Georgia legislature intended multiple punishment for kidnapping and malice murder in a case such as this. *Stephens v. Hopper*, 241 Ga. at 599–600, 247 S.E.2d at 95–96.

[6, 7] As felony murder is defined under Georgia law, the underlying felony is a lesser included offense of felony murder and thus the same offense under *Blockburger*. *See Young v. State*, 238 Ga. 548, 233 S.E.2d 750 (1977); *Reed v. State*, 238 Ga. 457, 233 S.E.2d 369 (1977). Once the State tried and convicted petitioner for kidnapping, it would be barred from prosecuting him for felony murder only if the underlying felony upon which that prosecution was based were that same kidnapping. *Illinois v. Vitale*, ____ U.S. ____, 100 S.Ct. 2260, 65 L.Ed.2d ____. *See Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715; *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977).

[8] We have examined the record closely to see whether the Bleckley County murder prosecution was based in any part on a theory of felony murder with the underlying felony being the kidnapping of Roy Asbell. The record clearly shows that petitioner was indicted, tried and convicted solely on the grounds that he committed murder with malice aforethought. The trial judge specifically instructed the jury on the requirement of malice.

> I further charge you that on the trial of a defendant for the offense of Murder the burden is on the State to prove malice, either expressed or implied, and unless the State proves malice beyond a reasonable doubt there can be no verdict of guilty of Murder, and you should acquit of that charge. For as I said, there can be no Murder without malice.

Where, as here, it is clear petitioner was tried and convicted for malice murder and that crime was not the "same offense" as the kidnapping with bodily injury for which he was convicted in the first proceeding, the Double Jeopardy Clause does not bar the malice murder conviction regardless of whether malice murder and felony murder are the "same offense" under the *Blockburger* test. Petitioner's double jeopardy argument is accordingly rejected.

II. INCOMPLETE TRANSCRIPT

The transcript in petitioner's murder trial does not include the closing and sentencing arguments of counsel or the *voir dire* of the jury. It appears that the entire trial was recorded by the court reporter. The customary practice in that court, however, was that *voir dire* and closing arguments were not transcribed in the absence of a request by the State or the defendant. Both of petitioner's attorneys were familiar with that practice but neither they nor the State requested that those portions of the trial be transcribed. Trial counsel were also informed by the trial judge that if they had any objections to the arguments, the objectionable portion of the argument and the objection would be transcribed. No objections were made. Thus, no part of closing arguments was transcribed.

At the time of petitioner's initial appeal to the Supreme Court of Georgia, the trial judge submitted as part of the record on appeal the detailed, seven-page questionnaire required by Ga. Code Ann. § 27-2537(a) and described in *Gregg v. Georgia*, 428 U.S. 153, 211–12, 96 S.Ct. 2909, 2942–43, 49 L.Ed.2d 859 (1976) (White, J., concurring). That questionnaire provided a comprehensive summary of the trial and a profile of the defendant.

An affidavit of the trial judge was received at the habeas

corpus hearing in state court. In that affidavit the trial judge made the following statement.

> In his closing argument, [the district attorney] factually summarized the evidence in the case. He made no allusions to race nor did he use any epithet in referring to Stephens. I recall no statement by [the district attorney] that was inflammatory or that injected passion or prejudice into the trial of Stephens.

Petitioner has not alleged that anything erroneous, inflammatory or prejudicial occurred in the untranscribed portion of the trial. As he stated in his brief, there is nothing to indicate that there was anything of special importance in that part of the trial. His contention, simply stated, is that a death sentence cannot constitutionally be affirmed when the transcript before the reviewing court does not contain the proceedings of the entire trial.

Petitioner relies principally on *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1976). In *Gardner*, the defendant was convicted of first degree murder and the jury recommended a life sentence. The trial judge did not accept the advisory verdict of the jury, but instead, on the basis of a presentence report, imposed the death penalty. The confidential portion of the presentence report was shown neither to counsel nor to the defendant, and neither requested to see it. The judge did not state on the record the substance of the material contained in the report. The report was also omitted from the record on appeal. The plurality opinion of Justice Stevens, joined by two other justices, found that this procedure violated the Due Process Clause and vacated the sentence.

[9, 10] *Gardner* does not establish the *per se* rule that petitioner attributes to it. The decisive test is the one suggested by the plurality's statement that the procedure on

appeal should be "[ ] consistent with the basis upon which the [state's] capital-sentencing procedure was upheld." *Id.* at 360 n.11, 97 S.Ct. at 1205. This Court must examine *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, to determine the basis upon which Georgia's capital-sentencing procedure was upheld and thereby identify the function the Georgia Supreme Court's review is to play in that procedure. If the record presented to the Georgia Supreme Court was so deficient that it would be impossible for that court to perform the function required of it under *Gregg*, or would create "a substantial risk" that the penalty is being inflicted in an arbitrary and capricious manner, *id.* at 188, 96 S.Ct. at 2932, petitioner's sentence cannot be permitted to stand. This analysis is especially appropriate where, as here, the case was tried and appealed before the decision in *Gregg*.

In discussing the automatic appeal of death-sentence cases to the Georgia Supreme Court, the *Gregg* plurality identified the role of that court in reviewing death sentences.

> That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.

Id. at 198, 96 S.Ct. at 2936.

Several considerations convince us that the record on appeal to the Georgia Supreme Court was adequate to permit that court to make the determinations required of it under *Gregg*. For the reasons set out below, we hold that *Gardner* is not controlling here and that petitioner's sentence should not be overturned on this ground. First,

the report in *Gardner* was clearly the key element in the decision to impose the death penalty, for it contained "the factual basis for the judge's rejection of the advisory verdict." 430 U.S. at 362, 97 S.Ct. at 1206. Without it, it was impossible for the state supreme court to determine whether the state was "administer[ing] its capital-sentencing procedures with an even hand." *Id.* at 361, 97 S.Ct. at 1206. In this case, however, the bases for the imposition of the death penalty are set forth in the record, and the record is more than adequate to permit the state court to determine whether the death penalty was imposed with an even hand.

Second, the plurality in *Gardner* was obviously disturbed by defense counsel's lack of opportunity to comment on and object to the portion or the report not in the record, and to challenge the accuracy or materiality of the information it contained. Honest and robust debate between adversaries is essential in foreclosing the possibility, in both fact and appearance, for the intrusion of caprice, emotion, and other arbitrary influences in the truth-seeking process. In the absence of such debate, it may be difficult to achieve accuracy and avoid the appearance of arbitrariness. In the present case, all proceedings took place in open court and all counsel had a full opportunity to comment on and challenge those proceedings. The appearance of arbitrariness is thus not a factor here as it was in *Gardner*.

Third, unlike in *Gardner*, there is affirmative evidence here that the conviction and sentence were based on the evidence presented and transcribed. The State has come forward with affirmative and uncontroverted proof that in the untranscribed arguments the district attorney merely factually summarized the evidence in the case. In addi-

tion, the jurors were twice instructed to base their decision on the facts and inferences presented in the evidence. The failure of petitioner's attorney to make any objection to the argument must also be seen as further evidence that there was no injection of anything prejudicial to petitioner and that the jury received the case solely on the basis of the evidence.

Fourth, the Georgia Supreme Court had before it in this case the detailed report of the trial judge on the defendant and the trial. At least three justices in *Gregg* felt the presence of this report was a significant factor in the state supreme court's review function.

> An important aspect of the new Georgia legislative scheme, however, is its provision for appellate review. Prompt review by the Georgia Supreme Court is provided for in every case in which the death penalty is imposed. To assist it in deciding whether to sustain the death penalty, the Georgia Supreme Court is supplied, in every case, with a report from the trial judge in the form of a standard questionaire. . . . The questionaire contains, *inter alia*, six questions designed to disclose whether race played a role in the case and one question asking the trial judge whether the evidence forecloses "all doubt respecting the defendant's guilt."

Id. at 211-12, 96 S.Ct. at 2942-43 (opinion of White, J., joined by Burger, C. J. and Rehnquist, J.). No such report was available to the state supreme court in *Gardner*.

Fifth, as noted above, petitioner has neither alleged nor offered any evidence that he was actually prejudiced by anything said in the untranscribed portion of the trial or by the failure to make the transcription. Both petitioner and one of his trial attorneys were present at the habeas corpus hearing in the Superior Court and neither suggested anything that was harmful, erroneous, inflamma-

tory, or prejudicial. *See Clayton v. Blackburn*, 578 F.2d 117 (5th Cir. 1978).

[11] The presence of these factors persuades us that the record as a whole adequately meets "the need for reliability in the determination that death is the appropriate punishment in [this] specific case," *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, Powell and Stevens, JJ.), and that the capital-sentencing procedures have been administered with an even hand. *See Gardner v. Florida*, 430 U.S. at 361, 97 S.Ct. at 1206; *Proffitt v. Florida*, 428 U.S. 242, 250-53, 96 S.Ct. 2960, 2965-67, 49 L.Ed.2d 913 (1976) (opinion of Stewart, Powell and Stevens, JJ.). The state of the record reviewed by the Georgia Supreme Court was adequate to permit it to complete the review functions required of that court under *Gregg* and to ensure that there was no substantial risk that the death sentence was arbitrarily imposed. Accordingly, we hold that in this case the failure to transcribe counsel's arguments is not a constitutional violation requiring petitioner's sentence to be vacated.

Our holding should not be construed to suggest that we condone the failure of the trial court to transcribe the entire proceedings in a death penalty case. We note that the Supreme Court of Georgia has directed that the argument of counsel should henceforth be transcribed in all cases in which the death penalty is sought. *Stephens v. Hopper*, 241 Ga. at 600, 247 S.E.2d at 95.

[12] The question whether *voir dire* was properly conducted was considered by the Supreme Court of Georgia on direct appeal. *Stephens v. State*, 237 Ga. 259, 227 S.E.2d 261. That court ordered the trial record to be supplemented. From the extensive notes he made during the

trial, the judge filed a five-page supplement to the record on the *voir dire* issue, and that supplement was acknowledged by counsel. The detailed supplement clearly presented to the Supreme Court of Georgia the opportunity to consider any possible error or any injection of arbitrariness. Petitioner shows no prejudice from the failure to transcribe *voir dire*.

[13] The supplement also shows that the only potential juror expressing conscientious objections to the death penalty was struck by the State using one of its peremptory challenges. There is thus no *Witherspoon* issue in this appeal. *See Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

III. IMPROPER JURY INSTRUCTION

Petitioner contends that, while the jury was instructed in the sentencing phase of the trial that it must find at least one statutory aggravating circumstance before it could impose a death sentence, it was not instructed that even if it found such a circumstance it need not impose death.

[14] When an appellate court reviews the adequacy of an instruction to the jury, it must view the charge as a whole. *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973); *United States v. Brooks*, 611 F.2d 614, 619 (5th Cir. 1980). Only when the charge taken in its entirety fails to fairly present the issues to the jury will error be found. *United States v. Chandler*, 586 F.2d 593, 606 (5th Cir. 1978), *cert. denied*, 440 U.S. 927, 99 S.Ct. 1262, 59 L.Ed.2d 483 (1979).

[15] In his charge to the jury, the trial judge instructed them that they were to consider all the evidence of the case, including evidence of mitigation and aggravation. He

told the jury that unless one of the statutory aggravating circumstances was found to be proven beyond a reasonable doubt, they would not be authorized to impose a death penalty. He then specified which aggravating circumstances they could consider. He told them that if they wished to recommend mercy, they did not have to recite any mitigating or aggravating circumstances they might find. He concluded by instructing them how to fill out the forms.

Considering the charge as a whole, it is clear that the issue was fairly presented to the jury. The clear implication of the charge is that the jury could recommend mercy without stating what mitigating or aggravating circumstances could be present and yet the jury could still be free to impose life imprisonment. Petitioner's contention is rejected.

IV. AGGRAVATING CIRCUMSTANCES

The trial judge permitted the jury to consider four statutory aggravating circumstances: (1) the offense was committed by one who had escaped from lawful custody, Ga. Code Ann. § 27-2534.1(b)(9); (2) the offense was committed by one having a prior conviction for a capital felony, *id.* § 27-2534.1(b)(1); (3) the offense was committed by one having a substantial history of serious assaultive criminal convictions, *id.*; or (4) the offense was outrageously or wantonly vile, horrible or inhuman, *id.* § 27-2534.1(b)(7). The jury found the first three to be present but not the fourth.

Following trial and before petitioner's case was reviewed by the Supreme Court of Georgia, that court declared aggravating circumstance (3), commission by one having a substantial history of serious assaultive criminal

convictions, to be unconstitutionally vague. *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976). After eliminating that circumstance from consideration of petitioner's appeal, the Georgia court in this case found the evidence supported the jury's findings of the other statutory aggravating circumstances and held that the sentence was not impaired. *Stephens v. State*, 237 Ga. at 261-62, 227 S.E.2d at 263.

In his state habeas corpus petition, petitioner contended that aggravating circumstance (2), commission by one having a prior conviction for a capital felony, was also invalid because he was under no such conviction at the time the crime was committed although he was admittedly under conviction for a capital felony at the time of his murder trial. The Supreme Court of Georgia interpreted the statute, Ga. Code Ann. § 27-2534.1(b)(1), as requiring that the jury should consider his record as of the time of sentencing. Accordingly, petitioner's contention was rejected. *Stephens v. Hopper*, 241 Ga. at 602-03, 247 S.E.2d at 96-97.

[16] On appeal to this Court, petitioner argues that the presence of unconstitutional aggravating circumstance (3) before the jury and the questionable interpretation of aggravating circumstance (2) create such potential for the intrusion of arbitrary influences into his sentence as to violate his constitutional rights and require his sentence to be vacated. The Supreme Court of Georgia is the ultimate authority on the law of Georgia and we are not permitted to question its interpretation of that State's statutes. *Tennon v. Ricketts*, 574 F.2d at 1245. We must therefore treat circumstance (2) as it is interpreted by the Georgia Supreme Court.

The question presented, then, is whether the death

penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty.

In *Stromberg v. California*, 283 U.S. 359, 367-68, 51, S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court held that if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside. *Accord, Bachellar v. Maryland*, 397 U.S. 564, 570-71, 90 S.Ct. 1312, 1315-16, 25 L.Ed.2d 570 (1970); *Street v. New York*, 394 U.S. 576, 585-88, 89 S.Ct. 1354, 1362-63, 22 L.Ed.2d 572 (1969); *Yates v. United States*, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-73, 1 L.Ed.2d 1356 (1957). This settled principle of law applies with particular force in cases in which the death penalty has been imposed. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner. The Constitution requires that the sentencer's discretion be channeled by clear and objective standards that "make rationally reviewable the process for imposing a sentence of death." *Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990 (opinion of Stewart, Powell and Stevens, JJ.).

It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively

affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground. The presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it. The instruction on the invalid circumstance may have directed the jury's attention to those convictions. It cannot be determined with the degree of certainty required in capital cases that the evidence of those convictions, together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty.

[**17**] We hold that the jury's discretion here was not sufficiently channeled, *see Godfrey v. Georgia*, ___ U.S. ___, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and that the process in which the death penalty was imposed in this case was not "rationally reviewable." *Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990. *See also Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393. Petitioner's death sentence therefore cannot stand.

V. OTHER CONSIDERATIONS

In the brief filed by amicus curiae, NAACP Legal Defense and Educational Fund, the Court's attention is invited to three additional issues: (1) whether the trial judge should have ordered a competency hearing in light of petitioner's conduct at trial; (2) whether petitioner was

denied effective assistance of counsel because of counsel's inability to communicate with him; and (3) whether petitioner's uncounseled confession was knowing and voluntary, in view of allegations that it was given while appellant was under the influence of drugs. These issues may relate to petitioner's murder conviction, but they were not considered by the district court. On remand, that that court should take whatever action is appropriate with respect to those issues.

We reverse the district court's denial of habeas corpus relief insofar as it leaves standing the petitioner's death sentence, and the case is remanded for further proceedings.

REVERSED AND REMANDED.

THOMAS A. CLARK, Circuit Judge, concurring in part and dissenting in part:

I concur in the relief granted and all of the opinion except Part I which holds that there is no double jeopardy. It is my view that Stephens was placed in jeopardy for the offense of killing Asbill in Twiggs County under the holding of *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (Ga.Sup. Ct.1978). In that case the court decided, under facts virtually identical to those in this case, that Potts could receive two death penalties, one in Cobb County for the kidnapping with bodily injury of Priest and one in Forsyth County for the murder of Priest. In refuting Stephens' double jeopardy contention, the Georgia Supreme Court relied specifically on its holding in *Potts*. [1]

If Stephens had been tried in Twiggs County he could have received the death sentence in that county as well as in Bleckley County, where he was given the death sentence

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[1] *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, at 95 (1978).

which is the subject of this appeal. The only difficulty Stephens has in asserting the bar of his prior conviction to the subsequent prosecution, however, is in the venue provisions of Georgia law, which purport to vest jurisdiction for criminal homicides in the county where the cause of death was inflicted. The majority concludes that these provisions, as construed by the Georgia courts, divested the Twiggs County court of jurisdiction over the offense for which he was later tried, and which Georgia law required to be tried only in Bleckley County. I do not agree.

It is clear that Stephens could have received the death penalty in Twiggs County for the offense to which he there plead guilty, the kidnapping-with-bodily-injury-resulting-in-death of Roy Asbill. *Potts, supra,* says so. It is equally clear that Stephens could not have received the death penalty for any offense, however Georgia defines that offense and wherever Georgia requires that offense to be tried, absent proof that the victim was killed in the commission of the crime. As I understand Georgia law, that state does not now impose the death penalty for any offense not resulting in the death of the victim.[2] Since

[2] *Stanley v. State,* 240 Ga. 341, 241 S.E.2d 173, 179–80 (1977). If a death penalty in Twiggs County could be said to be based solely on kidnapping with bodily injury not resulting in death, I think the penalty, as affirmed in *Potts,* would be unconstitutional under *Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), and *Eberheart v. Georgia,* 433 U.S. 917, 97 S.Ct. 2994, 53 L.Ed.2d 1104 (1977), the latter of which set aside a death penalty for kidnapping with bodily injury as cruel and unusual punishment. A reading of the lower court opinion in *Eberheart,* 232 Ga. 247, 206 S.E.2d 12 (1974), does not make clear that he was charged with kidnapping with bodily injury, although there was a kidnapping and bodily injury. However, Justice Undercofler wrote the lower court opinion in *Eberheart* as well as the opinion in *Collins v. State,* 239 Ga. 400, 236 S.E.2d 759 (1977), where at 761, in referring to *Eberheart,* he recited that earlier case had involved: "two death sentences for rape and kidnapping with bodily injury."

Georgia law does not recognize any jurisdictional limitations on a court's power to punish as *homicide* a crime Georgia law does not call homicide, I do not feel any similar limitation on my duty to inquire whether the offenses are, within the meaning of the Constitution, the "same offense."

If Stephens could have received the death penalty under his Twiggs County indictment, as *Potts* clearly held that he could, it could only have been upon proof of the killing of the victim. Likewise, his subsequent prosecution for murder, under any theory of either malice or felony murder, would require proof that the victim was killed.[3] That death, by whatever name called, is the greater, greatest, and ultimate offense. And that single offense cannot be the basis for several offenses that would permit the state to seek a separate death penalty for malice murder, felony murder, kidnapping with bodily injury murder, *ad infinitum*. Such reasoning tortures the meaning of "same offense" and the intent of forbidding the placing of a person twice in jeopardy for that same offense.

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[3] In this respect it is immaterial that Stephens received only a life sentence for that part of the kidnapping that occurred in Twiggs County, a punishment that might constitutionally attach to what happened in Twiggs County, taking no account of the killing that followed in Bleckley County. *See* note 2, supra. The fact remains that it was within the power of the Twiggs County court to punish for the Bleckley killing, with a sanction reserved exclusively for killing. Jeopardy had attached, therefore, for the Bleckley County homicide when Stephens was brought to answer for that act in Twiggs County. The state needn't have more than one opportunity to punish for that killing, and the double jeopardy guaranty should prevent it.

Alpha Otis O'Daniel STEPHENS,
Petitioner-Appellant,

v.

Walter ZANT, Superintendent,
Respondent-Appellee.

No. 79-2407.

United States Court of Appeals,
Fifth Circuit.

June 18, 1981.

Appeal from the United States District Court for the Middle District of Georgia.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion November 26, 1980, 5 Cir., 1980, 631 F.2d 397).

Before INGRAM, RONEY and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

Upon consideration of the petition for rehearing filed by the appellee, we delete the following sentence that appears in 631 F.2d 397 on page 406, column 2, line 10:

> The presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it.

The two sentences immediately following the above sentence at page 406 of the slip opinion are modified to read as follows:

> The instruction on the invalid circumstance may have unduly directed the jury's attention to his prior convictions. It cannot be determined with the degree of

certainty required in capital cases that the instruction did not make a critical difference in the jury's decision to impose the death penalty.

The petition for rehearing is DENIED. No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc is denied.